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A TREATISE

ON THE

LAW AND PROCEEDINGS

IN

BANKRUPTCY

BY

FRANK O. LOVELAND

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit,
Author of "Forms of Federal Practice."

THIRD EDITION

CINCINNATI
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dedicated to the

HONORABLE HORACE H. LURTON,

Presiding Judge of the

United States Circuit Court of Appeals,

for the Sixth Circuit.

325320

PREFACE TO THE THIRD EDITION.

I wish to gratefully acknowledge the many kind words of approval expressed by judges and lawyers who have used the former editions of this work. Such expressions have been a source of encouragement in the work of preparing the present edition.

Three years have passed since the second edition was published. During that period more than two thousand opinions in bankruptcy cases have been reported in the books. Many new questions of law and procedure have arisen and been decided. The construction given to the several sections and phrases in the bankruptcy law has become more firmly established by additional authority. Many important questions, concerning which the courts of bankruptcy held conflicting views, have been settled by the Supreme Court of the United States.

In order to bring in all these matters in logical order it has been necessary to practically rewrite the book. In doing this new sections have been added and many subjects treated which were merely referred to in the earlier editions. In making the present revision I have preserved the titles and numbers of chapters and sections as in the earlier editions. I have also preserved the plan adopted in the former editions, which is as follows: To consider the power of congress upon the "subject of bankruptcies" under the constitution, the organization and jurisdiction of the courts of bankruptcy, and then to follow step by step, in its natural course, a proceeding in bankruptcy, from its inception, through the court of bankruptcy and the appellate court. Under the present Act proceedings by a debtor, by creditors against a common debtor, and to have a partnership declared bankrupt differ in the mode

of instituting them. After an adjudication and order of reference the proceedings are substantially the same, irrespective of how or by whom commenced.

By this arrangement the several provisions relating to the same proceeding, which are separated in the Act itself, are collected; so that the attorney may have before him all parts of the statute and the authorities relating to the particular question which is being investigated.

FRANK O. LOVELAND.

CINCINNATI, May 1, 1907.

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THE LAW AND PROCEEDINGS IN BANKRUPTCY.

CHAPTER I.

A BRIEF HISTORY OF BANKRUPT LAW.

§ 1. Bankrupt laws of the Romans.

In very early times the debtor was at the mercy of his creditors.[1] He might be imprisoned or suffer bodily torture, as his creditors willed.

The first steps toward a system of bankruptcy were taken with the object of relieving the debtor. These laws in some cases were carried to such an extent as to work great injustice to the creditors. The rights of the creditors were then again considered, but in connection with the rights of the debtor. Then for the first time appeared the chief principles of the law of bankruptcy, namely, that when a man is unable to pay his just debts the property remaining to him rightly belongs to his creditors, and ought to be distributed ratably among them towards the satisfaction of their debts. It was later that the debtor was released from future liability in respect

[1] Mr. Justice Blackstone, in his Commentaries (Vol. 2, pp. 472, 473), refers to the early Roman laws on this subject. The laws of the twelve tables provided that the creditors might cut the debtor's body in pieces, and each of them take his proportionate share. Other laws provided that the creditors might imprison the debtor in chains, or subject him to stripes and hard labor at their mercy, and sometimes sell him, his wife and children into perpetual slavery. Later, it is true, an equally vicious law was enacted for the benefit of the debtor, which provided that if an insolvent debtor would *swear* that he had not enough left to pay his debts, he should not be required to give up even that which he had in his possession.

to those debts, although from the first he was relieved from corporal punishment.

The first law resembling in any marked degree a bankrupt law, as it is understood at the present time, is found in the Roman law of cession—*cessio bonorum*. It was introduced by Julius Cæsar, and provided that if a debtor yielded up all his fortune to his creditors he was secured from being dragged to a goal "*omni quoque corporali cruciatu semoto.*"[1]

The law of cessions extended to all classes of persons, much like the present bankrupt law of the United States, but it did not release or discharge the debt or exempt the future acquisitions of the debtor from execution for the debt.[2] It merely exempted the debtor from imprisonment and corporal punishment.

§ 2. **Bankrupt laws in other countries.**

Similar laws were introduced in other continental countries in Europe. Chancellor Kent, writing in the first quarter of the present century, said:[3] "And it may be laid down as the law of Germany, France, Holland, Scotland, England, etc., that insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. In many parts of Germany, as we are informed by Huberus and Heineccius, a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future property. But in Germany the *cessio bonorum* has the severe operation of depriving the insolvent of his remedy for a personal trespass committed prior to the cession, so far as pecuniary compensation is in question." According to the Spanish law, property which the debtor acquired after his cession was not *all* liable for his debts, but only so much of it as exceeded the amount necessary for his support.[4]

[1] 2 Black. Com. 473.

[2] 1 Kent Com. 422–3. In Fitzgerald v. Phillips, 4 Martin (La.), O. S. 292, Judge Derbigny cites the *cessio bonorum* (l. 4, 5 and 6) of the Roman law to the effect that only so much of the property acquired after a cession as exceeded the amount necessary to the debtor's support was liable for his debts prior to the cession.

[3] 1 Kent Com. 423.

[4] But the early law of Louisiana, which was also founded on the civil law, contained no such exemption. Fitzgerald v. Phillips, 3 Martin, O. S. 588; s. c. 4 Martin, O. S. 292.

It is not within the scope of this sketch to consider the bankrupt laws of all countries. While the present act was pending, the judiciary committee of the House of Representatives took no little pains to ascertain from different sources what other countries had done in respect to bankruptcy legislation. This committee reported to congress December 16, 1897, that the following countries have bankruptcy laws: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Costa Rica, Denmark, England, France, Germany, Guatemala, Haiti, Honduras, Ireland, Italy, Liberia, Mexico, Netherlands, Norway, Paraguay, Portugal, Roumania, Russia, Scotland, Spain, Sweden, Turkey, Uruguay and Wales. The committee did not ascertain whether or not there was a bankruptcy law in Chile, Columbia, Dominican Republic, Hawaii, Japan, Korea, Peru, Syria, Switzerland or Venezuela. It will be observed that, aside from China and possibly Japan, there are no countries of any considerable importance but what have bankruptcy laws in the modern sense of the word.

"In China the various foreign nationalities, except the United States, have bankruptcy laws which are enforced against their nationals, those of Germany being very strict, and others perhaps less so. . . . There never was such a law in existence among the Chinese as a bankruptcy law. All delinquents in China pass into the dishonored class, and are soon put under process of coercive termination of a business career, and are subject to punishment by bamboo blows. The laws against bankrupts in China are, theoretically, very severe, a failure of $1,500 to $5,000 entailing banishment, and from $5,000 upward, summary decapitation. No distinction is made between fraudulent bankruptcy and unavoidable ones."

In Guadeloupe there is no relief whatever for a bankrupt.

In Siam "there are no bankruptcy laws, as we understand them. When a man's assets fall short of his liabilities he either compounds with his creditors or leaves the country hurriedly. If taken, his own person and those of his family may be held until the debt be paid."

§ 3. English bankrupt laws.

The bankrupt law was an innovation on the common law. The English system of bankruptcy was borrowed directly from continental jurisprudence.[1] "We have fetched," said Lord Coke, "as well the name as the wickedness of bankrupts from foreign nations."[2] The English word bankrupt is derived from the Italian, *banca rotta*, meaning a broken bank or bench.[3]

The English system of bankruptcy originated in 1542 with the statute of 34 and 35 Henry VIII., chap. 4. It has been frequently modified by subsequent legislation, but it has never been abolished during any period since that time. Originally a bankrupt was considered a criminal offender.[4]

The law of Henry VIII. was directed against debtors, whether traders or not, who sought fraudulently to evade the payment of their debts, or, as it was expressed in the act, "who, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown or keep their houses, not minding to pay, or return to pay, any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience." The next statute was that of 13 Elizabeth, chap. 7. By this statute the law of bankruptcy was restricted to traders, and certain acts were

[1] 2 Blackstone's Com. 472.

[2] 4 Inst. 277.

[3] See Skeat's Etym. Dic., subject, Bankrupt; Century Dic., subject, Bankrupt; 2 Blackstone's Com. 472.

"It is said to have been the custom in Italy to break the bench, or counter, of a money-changer upon his failure; but the allusion is probably figurative, like *break*, *crash*, *smash*, similarly used in English." — *Century Dic.*, BANKRUPT.

Mr. Justice Blackstone suggests another derivation, when he says:

"Some choose to adopt the word *route*, which in French signifies a trace, or track, and tells us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence (34 Hen. VII., c. 4), 'against such persons as do make bankrupt' is a literal translation of the French idiom, *qui font banque route*." — 2 Blackstone's Com. 472 N.

[4] 2 Blackstone's Com. 471.

prescribed, called acts of bankruptcy, upon the committing of which a trader became liable to be adjudged a bankrupt.

It was not until the statutes of 4 Anne, chap. 17, and 10 Anne, chap. 15, that the bankrupt law lost its criminal nature. The bankrupt law then became an equitable system. The bankrupt, upon surrendering his property and conforming to the requisitions of the bankrupt law, was entitled to a certificate of discharge. This was obtained only with the consent of a specified majority of his creditors. When it was issued it released him from liability for his prior debts.

In 1825, by the general bankrupt act of 6 George IV., chap. 16, the former statutes were consolidated and many important alterations introduced.

In the year 1831 an important change was made in the mode of administering the bankrupt law. Courts of bankruptcy were established by the statute of 1 and 2 William IV., chap. 56. Before this time the law had been administered by the lord chancellor or by commissioners appointed by the chancellor. This statute removed the jurisdiction of bankrupt cases in the first instance from the court of chancery to that of bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence. Other important alterations were introduced. Thus under this statute there was no deed of assignment of the bankrupt's property, but the property vested in the assignees by operation of law under their appointment.

This statute was followed by 5 and 6 William IV., chap. 29, and by 5 and 6 Victoria, chap. 122, which further modified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the bankrupt law consolidation act of 1849. This was amended in a few particulars by the act 15 and 16 Victoria, chap. 77, and by the bankruptcy act, 1854. A further amendment of the law of bankruptcy, known as the "Bankrupt Act, 1861," 24 and 25 Victoria, chap. 134, abolished the court for the relief of insolvent debtors and transferred its jurisdiction to the court of bankruptcy. By this act non-traders were made subject to the law of bankruptcy. By the "Bankruptcy Amendment Act, 1868," 31 and 32 Victoria, chap. 104, further changes were made.

After unsuccessful attempts in several successive sessions of parliament to reform the bankrupt laws, the general bankrupt act of 32 and 33 Victoria, chap. 71, was passed in 1869. This act in turn was followed by an act entitled "An act to amend and consolidate the laws of bankruptcy," 46 and 47 Victoria, chap. 52, passed in 1883, to take effect from the first of January, 1884. This act, with its amendments, comprises all the statute law relating to bankrupts, except the provisions for the punishment of fraudulent debtors, which are contained in the Debtors' Act of 1869, 32 and 33 Victoria, chap. 62, which were not repealed by the act of 1883.[1] This act of 1883 has been several times amended. The principal amendments are: the act of 50 and 51 Victoria, chaps. 57 and 66, passed September 16, 1887; the act of 51 and 52 Victoria, chap. 62, passed December 24, 1888; the act of 53 and 54 Victoria, chap. 71, passed August 18, 1890, and the act of 60 and 61 Victoria, chap. 19, passed July 15, 1897.

It is not, however, within the scope of this work to discuss the English acts at length, or to follow step by step the development of the present system of bankruptcy in England. For this purpose the reader is referred to modern works on English bankrupt laws.[2]

§ 4. Bankrupt laws of the United States.

Congress has established four systems of national bankruptcy in this country. The first system originated with the act of April 4, 1800,[3] which was repealed December 19, 1803.[4] There was no national bankruptcy act thereafter until the act of August 19, 1841.[5] This statute was repealed within two years after its passage,[6] and again the nation was without a uniform system of bankruptcy. The third general

[1] "By the Bankruptcy Act, 1883, the Bankruptcy Act, 1869, is repealed, subject to provisions for carrying out proceedings pending under it. But the Debtor's Act, 1869, remains in force, subject only to such alterations as were necessary for adapting it to the new Bankruptcy Act." (Robson Bank., page 21.

[2] Robson's Law and Practice in Bankruptcy (1894); Williams' Bankruptcy Practice (1898).

[3] 2 Stat. at L. 19.

[4] 2 Stat. at L. 248.

[5] 5 Stat. at L. 440.

[6] Act of March 3, 1843, 5 Stat. at L. 614.

act was passed March 2, 1867,[1] by the 39th Congress. The system established by this statute existed eleven years, and was terminated September 1, 1878, by the act of June 7, 1878.[2] The present statute, establishing a uniform system of bankruptcy throughout the United States, was passed July 1, 1898,[3] and amended by the Act of Feb. 5, 1903.[3*]

It may be observed that each of these systems differed materially from all the others, although necessarily similar in many respects. It may be, therefore, of interest in considering the present statute to review briefly the principal provisions of the former legislation in the United States on the subject of bankruptcies.

§ 5. The Act of 1800.

The first national bankrupt act[4] was confined to "any merchant, or other person, residing in the United States, actually using the trade of merchandise, by buying and selling in gross or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer."[5] Under this act proceedings in bankruptcy could be instituted only by a creditor—involuntary bankruptcy—and not by the insolvent himself. There was no provision in this act for voluntary bankruptcy.

Under this statute bankruptcy proceedings could be commenced only after the person to be adjudged a bankrupt had committed an act of bankruptcy specified in the act.

The act provided that it should constitute an act of bankruptcy if a person liable to be adjudged a bankrupt, "with

[1] 14 Stat. at L. 517.

[2] 20 Stat. at L. 99, 1 Supp. 170.

[3] 30 Stat. at L. 544. This statute is printed in full at the end of this volume.

[3*] 32 Stat. at L. 797.

[4] Act of April 4, 1800. 2 Stat. at L. 19.

Cases arising under or construing this act are: Tucker v. Oxley, 5 Cranch, 34; Harrison v. Sterry, 5 Cranch, 289; Comegys v. Vasse, 1 Pet. 193; Richards v. Ins. Co., 8 Cranch, 84; Woods v. Owings, 1 Cranch, 239; Blight v. Ashley, No. 1541 Fed. Cas., s. c. Pet. C. C. 15; Barnes v. Billington, No. 1015 Fed. Cas., s. c 1 Wash. C. C. 29; Marks v. Barker, No. 9096 Fed. Cas., s. c. 1 Wash. C. C. 178; Humphreys v. Blight, No. 6870 Fed. Cas., s. c. 1 Wash. C. C. 44, 4 Dall. 370; Lucas v. Morris, No. 8587, Fed. Cas., s. c. 1 Paine, 396.

As to the powers of Congress, see also Sturges v. Crowninshield, 4 Wheat. 122; Sec. 9, *post*.

[5] Act of April 4, 1800, 2 Stat. at L. 19 Sec. 1.

intent unlawfully to delay or defraud his or her creditors, depart from the state in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she can not be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose land or effects being attached by process issuing out of or returnable to any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she may be arrested at or before the return day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt."[1]

Within six months after such act had been committed a petition for a commission of bankruptcy might be preferred by a creditor or partnership whose single debt amounted to one thousand dollars, or by two creditors whose debts amounted to fifteen hundred dollars, or by more than two creditors whose debts amounted to two thousand dollars.

Under the act of 1800, proceedings in bankruptcy were instituted by filing a petition for a commission of bankruptcy in the district court for the district in which the debtor

[1] 2 Stat. at L. 21, Sec. 1.

resided. The judge of the district court thereupon issued such commission, appointing commissioners of such bankrupt not exceeding three in number.[1] Immediately upon taking the oath prescribed by the act, they proceeded to execute the commission and to administer the estate of the bankrupt.

The administration of the estate in brief was as follows: Upon due examination and sufficient cause shown against the person charged, the commissioners declared him to be a bankrupt, and took into their possession all of his real and personal property, together with his deeds, books of account, papers, etc. They held the same until an assignee was chosen by the creditors at a meeting called for that purpose. It was the duty of the assignee to hold the title to the estate and to collect the assets of the bankrupt. Within one year after the commission issued the assignee was required to report the amount of moneys in his possession at a meeting of the commissioners and creditors duly called by notice. The commissioners in their judgment declared the first dividend at this meeting. This was paid to all creditors who had proved their claims before the commissioners. Provisions were made for similar dividends subsequently, until the whole estate of the bankrupt had been distributed *pro rata* among the creditors.

The commissioners reported to the court what had been done in making their return of the commission. The debtor was thereupon entitled to be discharged from all debts by him due and owing at the time he was declared a bankrupt. A certificate of discharge was issued by the court to such bankrupt, which might be pleaded in bar of any claims which had been or might have been proven before the commissioners.

The life of this act was limited to five years, but owing to the inconvenience of reaching federal courts this system became unpopular, and the act was repealed by the act of December 19, 1803.[2]

[1] By Sec. 14 of the Act of April 29, 1802, 2 Stat. at L. 164, provision was made for general commissioners of bankruptcy to be appointed by the President of the United States.

[2] 2 Stat. at L. 248.

§ 6. The Act of 1841.

The second act[1] provided for voluntary as well as involuntary bankruptcy.

Any person whatsoever residing in the United States owing debts which were not created in consequence of a defalcation as a public officer, or an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, was entitled under this act to be declared a bankrupt upon his own request and to have his estate administered accordingly.

Any person being a merchant, or using the trade of merchandise, or a retailer of merchandise, or any banker, factor, broker, underwriter or marine insurer owing debts to the amount of not less than two thousand dollars, was liable to be declared a bankrupt at the request of one or more of his creditors to whom he owed debts amounting in the whole to not less than five hundred dollars, provided he had committed an act of bankruptcy.

An act of bankruptcy was defined in these words, "whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter or marine insurer, shall depart from the state, district or territory of which he is an

[1] Act of August 19, 1841, 5 Stat. at L. 440.

The following are cases under the act: Nelson v. Carland, 1 How. 265; Chapman v. Forsyth, 2 How. 202; Lessee of Waller v. Best, 3 How. 111; *Ex parte* The City Bank of New Orleans, 3 How. 292; Nugent, Assignee, v. Boyd, 3 How. 426; Black v. Zacharie, 3 How. 483; Shawhan v. Wherrett, 7 How. 627; *In re* Shouse, Crabbe, 482, s. c. No. 12815, Fed. Cas.; Wakeman v. Hoyt, 5 Law Rep. 309, s. c. No. 17051, Fed. Cas.; Albany Exch. Bank v. Johnson, 5 Law Rep. 313, s. c. No. 131, Fed. Cas.; Atkinson v. Farmers' Bank, Crabbe, 529, s. c. No. 609, Fed. Cas.; *In re* Bonnet, 1 N. Y. Leg. Obs. 310, s. c. No. 1632, Fed. Cas.; Fisher, et al., v. Currier, 5 Law Rep. 217, No. 4818, Fed. Cas.; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131, s. c. No. 7496, Fed. Cas.; Stewart v. Loomis, No. 13433, Fed. Cas.; Baldwin v. Rosseau, 1 N. Y. Leg. Obs. 391, s. c. No. 803, Fed. Cas.; *In re* House, 1 N. Y. Leg. Obs. 348, s. c. No. 6735, Fed. Cas.; *Ex parte* Potts, Crabbe, 469, s. c. No. 11344, Fed. Cas.; Barton v. Tower, 5 Law Rep. 214, s. c. No. 1085, Fed. Cas.; *Ex parte* Galbraith, 1 N. Y. Leg. Obs. (note) 5, s. c. No. 5187, Fed. Cas.; Gassett, et al., v. Morse, 3 N. Y. Leg. Obs. 350, s. c. No. 5264, Fed. Cas.; Hutchins v. Taylor, 5 Law Rep. 289, s. c. No. 6953, Fed. Cas.

inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, or evidence of debt.'' [1]

Proceedings under this act were instituted by a petition filed by the bankrupt, setting forth a list of his creditors, with the amounts due each, together with an inventory of his property and assets of every description; or by a petition filed by a creditor, stating the nature of the act of bankruptcy, the amount of his debts, and alleging the total indebtedness of the bankrupt to be more than two thousand dollars.

This petition was filed and all proceedings in the case were had in the district court for the district in which the person supposed to be a bankrupt resided or had his place of business. The court appointed an assignee, in whom the title to all the bankrupt's property, real, personal and mixed, vested by operation of law. The assignee proceeded to collect the assets of the bankrupt, prosecute and defend suits, and had general authority to sell, manage and dispose of the estate. Proof of debts and claims were made before the court, either by oral testimony or depositions. In order to secure a speedy settlement and close the proceedings, it was made the duty of the court to order and direct a collection of the assets and a reduction of the same into money and a distribution thereof at as early a period as practicable, consistently with a due regard to the interests of the creditors.

A bankrupt who made a *bona fide* surrender of his property and complied with the orders and directions of the court was entitled to a certificate of discharge from all his debts. This was to be decreed and allowed by the court which had declared him a bankrupt. There were several exceptions to this rule, but they are not important in this connection.

[1] 5 Stat. at L. 442.

The same objection was raised to this act that had been made to the act of 1800, for the nation was still in its infancy, and the means of transportation were exceedingly limited. But in addition to this, the following is found in the report of the judiciary committee in the 52d Congress, first session, in its discussion of the act of 1841: "That law became the subject of political contention, and was repealed, to take effect March 3, 1843."[1]

§ 7. Law of 1867.

The act of 1867,[2] with its subsequent amendments,[3] established a system of national bankruptcy, which was in full operation for eleven years. Although the act of 1867 differs in many respects from that of 1898, there are many points of similarity between the two statutes. The courts were frequently called upon to construe the provisions of the act of 1867 and its amendments. Many questions, which will arise under the present act, may be considered settled by these decisions. Although many decisions under the former act are not controlling with reference to very many provisions of the present act, yet very many of them are important in throwing light upon the meaning of terms and provisions employed. It is obvious that certain provisions were introduced in the present act for the purpose of settling disputed questions and to avoid judicial construction of provisions of the prior act. The cases decided under the act of 1867 therefore become

[1] Act of March 3, 1843, 5 Stat. at L. 614.

See Report of the House Committee on Judiciary, 55th Congress, 2d session, discussing the Act of 1898.

[2] Act of March 2, 1867, 14 Stat. at L. 517.

[3] The principal amendment to this act was passed June 22, 1874, 18 Stat. at L. 178, and at the same time a complete substitute for the act was enacted in title sixty-one of the Revised Statutes. The provisions of the amendment of 1874 are incorporated in the Revised Statutes, edition of 1878. The Act of 1867 was also amended by the Act of July 27, 1868, 15 Stat. at L. 227; by the Act of June 30, 1870, 16 Stat. at L. 173; by the Act of July 14, 1870, 16 Stat. at L. 276; by the Act of June 8, 1872, 17 Stat. at L. 334; by the Act of Feb. 13, 1873, 17 Stat. at L. 436; by the Act of March 3, 1873, 17 Stat. at L. 577; by the Act of Feb. 18, 1875, 18 Stat. at L. 320; by the Act of July 26, 1876, 19 Stat. at L. 102, and by the Act of Feb. 27, 1877, 19 Stat. at L. 252.

important in construing the present statute. To intelligently use the earlier decisions in construing and applying the present act, it will be necessary to constantly consult the text of the act itself, and to compare it with similar provisions of the act of 1898. For this purpose the act of 1867, as revised and amended, is printed in full in another place.[1] It is therefore unnecessary to state the general scheme of this system here. The reader is referred to the act itself for such information.

The principal objection to the act of 1867 was the great expense of administering it, and in some parts of the country the inefficiency of the officers appointed to assist the courts in executing the law. It was repealed, to take effect September 1, 1878.[2]

The next national system of bankruptcy in this country was established by the act of July 1, 1898.[3]

§ 8. **A brief comparison of the Acts of 1867 and 1898.**

SIMILARITY OF THE ACTS.—The general scope and objects sought to be accomplished by these two statutes are substantially the same. In both instances congress evidently intended to legislate fully on "the subject of bankruptcies." Each statute provides that proceedings may be instituted by the insolvent or by his creditors. In other words, each statute establishes voluntary as well as involuntary bankruptcy.

The principal ends of each statute are to provide a system of bankruptcy, the object of which is, *first*, to ascertain whether the person whose affairs are drawn in question has become a bankrupt; *second*, if so, to take into legal custody all his property and assets of every description for the purpose of making a fair and just distribution among his creditors; *third*, to protect the creditors from frauds and unjust preferences; *fourth*, to ascertain the amount due to the several creditors and their priority; *fifth*, to relieve the bankrupt from his load of debts and to discharge him free to acquire property, which shall not be liable to the payment of ante-bankrupt debts. In short, the acts seek to enable every honest debtor, irrespective of whether he becomes bankrupt

[1] See page 865, *post*.

[2] Act of June 7, 1878, 20 Stat. at L. 99, 1 Supp. 170.

[3] 30 Stat. at L. 544 This act, as amended Feb. 5, 1903, 32 Stat. at L. 397, is also printed in full at page —, *post*.

upon his own or the petition of his creditors, to have fair treatment and a speedy consideration of his rights; and that the creditors shall have their claims considered, allowed, and the assets of the debtor ratably divided.

The administration of each law is confided to particular United States courts, designated as courts of bankruptcy. These courts act to a large extent through special officers, subject to have their action reviewed by the judge. In 1867 these officers were called registers and assignees; in 1898 they are called referees and trustees. The action of the courts of bankruptcy under each act is subject within limits to review by the appellate courts of the United States.

Points of Difference between the Acts.—The act of 1898 differs in many respects from the act of 1867. The chief points of difference between the acts may be briefly stated as follows:

First, Under the act of 1867 a person could take advantage of voluntary bankruptcy only when his debts exceeded the amount of three hundred dollars. Under the present act all limitation is removed as to the amount of indebtedness. He may even proceed without expense upon filing an affidavit of his poverty.

Second, Under the act of 1867 corporations could take the benfit of their voluntary provisions. A corporation can not institute proceedings to declare itself a bankrupt under the present act.

Third, Under the act of 1867, as amended, any person owing debts provable in bankruptcy exceeding the amount of three hundred dollars could be proceeded against by one of his creditors, but under the act of 1898 a person must be indebted to the amount of one thousand dollars or more in order to be adjudged a bankrupt.

Fourth, Under the act of 1867 a person might become a bankrupt although solvent,[1] but solvency may be pleaded

[1]By reference to Section 5021 of the Revised Statutes it will be seen that the act of 1867, as amended, provides that any banker, broker, merchant, trader, manufacturer, or miner, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days shall be deemed to have committed an act of bankruptcy, and to have become liable to be

in bar of any proceeding in bankruptcy under the act of 1898.[1]

Fifth, Another important difference between the two acts is in the time when the property passes out of the bankrupt. Under the act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of law under the act of 1898 as of the date of the adjudication in bankruptcy.

Sixth, Another difference in the manner of administering the bankrupt's estate is the more convenient number of officers. Under the act of 1867 one or more registers were appointed for the district, but the act of 1898 provides for at least one referee in each county in the state.

Seventh, The act of 1867 provided no means of arbitration in addition to the regular course in bankruptcy.[2] Under the present act the majority of all creditors, whose claims have been allowed, may secure the possession of the property, and obtain for the debtor a dismissal of the case. In addition to this, provision is also made for the arbitration and for the compromise of controversies.

Eighth, Under the act of 1867 the "operative, clerk and house servant" were allowed priority over other claims to an amount not exceeding fifty dollars for labor performed. Under the present act the amount is fixed at three hundred dollars to each claimant.

Ninth, Under the act of 1867, as amended, no discharge was granted to a debtor whose assets did not equal fifty per-centum of the claims proved against his estate, for which he was held liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors was filed in the case at or before the time of the hearing of the

adjudged a bankrupt. He may be worth a million dollars over and above his liabilities, and yet such a failure for fourteen days would make him liable to the involuntary provisions of the act; or if he fraudulently stopped payment of his commercial paper, that constituted an act of bankruptcy at once.

[1] B. A. 1898, Sec. 3*c*.

[2] It, however, was introduced by the amendment of June 22, 1874, 18 Stat. at L. 178, Sec. 17. R. S., Sec. 5103.

application for a discharge. Under the act of 1898 no assent is required from the creditors. If the debtor has acted dishonestly by committing certain acts forbidden in the act he will not be discharged; if he has acted honestly he will be. The granting or withholding of it is dependent upon the honesty of the man, not upon the value of his estate.

Tenth, Another point of difference between the two acts will be noticed in a comparison between the fees allowed. The expense of the proceedings is very much reduced in the act of 1898.

There are other differences which will be referred to hereafter as the various questions arising under the present statute are discussed.

CHAPTER II.

THE POWER OF CONGRESS AND THE STATES TO ENACT BANKRUPT LAWS.

§ 9. The power of Congress to enact bankrupt laws.

The power of congress to establish a system of bankruptcy depends, like the other powers of congress, solely upon the constitution of the United States. The only provision in the constitution relating to such legislation is that "congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."[1]

This has been construed by the courts to be a grant of plenary power.[2] Under the authority of this provision congress has full power to legislate on "the subject of bankruptcies," with the one qualification that its laws thereon shall be uniform throughout the United States.

It is therefore necessary to consider what is meant by "the subject of bankruptcies." It was contended at one time that the framers of the constitution intended to restrict the laws of congress with such scope only as the English bankrupt laws had when the constitution was adopted. But the courts ruled that the subject was not so limited.[3]

[1] U. S. Const. Art. 1, Sec. 8, clause 4. See Story on the Constitution, Secs. 1105–1115.

[2] *In re* Klein, 1 How. 277, note; Silverman's case, No. 12855, Fed. Cas., s. c. 1 Saw. 410; *In re* California Pac. R. Co., No. 2315, Fed. Cas., s. c. 3 Saw. 240; *In re* Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180; *In re* Irwine, 1 Penn. L. J. 291; Kunzler v. Kohaus, 5 Hill, 317; *In re* Reiman No. 11673, Fed. Cas., s. c. 7 Ben. 455.

In Parmenter Mfg. Co. v. Hamilton, 51 N. E. 529, the Supreme Court of Massachusetts, construing the present act, and speaking of the power of congress to pass a bankrupt law superseding state insolvent laws, said: "Of the power of congress to pass an act having this effect there can be no doubt." See also, *In re* Bruss-Ritter Co., 90 Fed. Rep. 651.

[3] *In re* Reiman, No. 11673, Fed. Cas., s. c. 7 Ben. 455; *In re* Klein, 1 How. 277, note; *In re* Silverman, No. 12855, Fed. Cas., s. c. 1 Saw. 410.

Again, it was contended that it was restricted to bankrupt laws as distinguished from insolvent laws. But it may be regarded as settled that the subject of bankruptcies, as used in the constitution, includes both bankrupt and insolvent laws.[1] Speaking of this distinction, Mr. Justice Marshall observed:[2] "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." And Judge Cowen, after reviewing the definition of bankruptcy, said:[3] "Looking thus at the uniform popular acceptation of the word from earliest times, and in all English countries, and supposing that to be the true one, I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States.'"

It has also been held that the power of the national legislature is not limited to bankrupt laws relating to any particular class of persons, as traders, merchants, etc., but that congress may pass laws applying to all or any persons within the United States.[4]

Congress has power also to modify the obligation of contracts in the legitimate exercise of the power to establish bankrupt laws.[5] This is incidental to the power directly

[1] *In re* Klein, 1 How. 277, note; Thompson v. Alger, 53 Mass. 442; Kunzler v. Kohaus, 5 Hill, 317; Keene v. Mould, 16 Ohio 12; McCormick v. Pickering, 4 N. Y. 276; Rowan v. Holcomb, 16 Ohio, 463; Loud v. Pierce, 25 Me. 233; Lalor v. Wattles, 8 Ill. 225; State Bank v. Wilborn, 6 Ark. 35; Reed v. Vaughn, 15 Mo. 137; Cutter v. Folsom, 17 N. H. 139; *In re* Irwine, 1 Penn. L. J. 291; Morse v. Hovey, 1 Sandf. Ch. 187.

[2] In Sturgis v. Crowninshield, 4 Wheat. 195.

[3] In Kunzler v. Kohaus, 5 Hill, 321.

[4] Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, s. c. 37 C. C. A. 210; Hanover Nat. Bank v. Moyses, 186 U. S. 181; *In re* Klein, 1 How. 277, note; *In re* California Pac. R. Co., No. 2315, Fed. Cas., s. c. 3 Saw. 240; Sweatt v. Boston, etc., R. Co., No. 13684, s. c. 3 Cliff. 339; Winter v. Iowa, etc., R. Co., No. 17890, Fed. Cas., s. c. 2 Dill, 487; Kunzler v. Kohaus, 5 Hill 317.

[5] *In re* Klein, 1 How. 277, note, Kunzler v. Kohaus, 5 Hill 317; Sackett v. Andrews, 5 Hill 327; Keene v. Mould, 16 Ohio 12; McCormick v. Pickering, 4 N. Y. 276; Loud v. Pierce, 25 Me. 233; *In re* Reiman, No. 11675, Fed. Cas., s. c. 12 Blatch. 562.

given by the constitution. Hence congress may provide for the discharge of a debtor, releasing him from contracts existing at the time the law is passed. An act of congress may be constitutional, when, if the same act was passed by a state legislature, it would be unconstitutional.[1]

Another incident growing out of this delegated power is the authority to commit the execution of the system to the courts of the United States, and to prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation.[2]

It may be observed that the extent to which this power shall be exercised rests in the discretion of congress, subject only to the qualification that such laws shall be uniform through the United States. The uniformity required relates to national legislation only, and therefore the laws of the several states, as those regulating exemptions, may be left in force so long and to such extent as congress may see fit.[3]

The power of congress to establish laws on the subject of bankruptcies is exclusive, while exercised, but when or so far as it is not exercised its existence does not defeat state legislation.[4] The effect of a national bankrupt law is to suspend

[1] The Constitution expressly prohibits states from passing laws "impairing the obligation of a contract." Const., Art. 1, Sec. 10.

In re Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180. Judge Dick, speaking of the Bankruptcy Act of 1867, said: "If this state had adopted the present bankrupt law it would have been unconstitutional, as it impairs the obligation of contracts and affects the rights of citizens of other states. Congress, however, could adopt the very language and principles of such state law and enact it as a national law, and such action would be constitutional; as it would constitute a system of bankruptcy uniform among the states."

[2] Mitchell v. Mf. Co., No. 9662, Fed. Cas., s. c. 2 Story, 648; Goodall v. Tuttle, No. 5533, Fed. Cas., s. c. 3 Biss. 219; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552.

[3] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209, Fed. Cas., s. c. 1 Dill, 45; *In re* Jordan, No. 7514, Fed. Cas., s. c. 8 N. B. R. 180; *In re* Jordan, No. 7515, Fed. Cas., s. c. 10 N. B. R. 427; *In re* Kean, No. 7630, Fed. Cas., s. c. 2 Hughes, 322; *In re* Rouse, Hazard & Co., 41 Law Bul. (Cinti.) 34, s. c. 1 Nat. Bank News, 75.

[4] Sturges v. Crowninshield, 4 Wheat. 122; Baldwin v. Hale, 1 Wall, 228; Cook v. Moffat, 5 How. 295. See also Power of States, Sec. 10, *post*.

only, not to extinguish state laws.[1] The disability is removed when the act of congress is repealed, and the state laws become immediately operative without reenactment.[2]

The Bankruptcy Act of 1898 is constitutional and valid legislation.[2*]

§ 10. Power of the states to enact bankrupt and insolvent laws.

Prior to the adoption of the constitution of the United States the several "states could exercise almost every legislative power, and among others, that of passing bankrupt laws."[3] They retained all such powers after its adoption, except those expressly granted to the national government. A part of the powers so granted are to be exercised exclusively by congress, and the subject is completely taken away from the state legislatures. Other powers were yielded by the states to be exclusively exercised by congress, provided that body saw fit to legislate upon the subject. But until the national legislature exercised this power, the state legislatures retained the power to enact laws on the same subject. The power to pass laws on "the subject of bankruptcies" is of the latter class of grants.[4]

It is well settled that the several states may pass bankrupt and insolvent laws, subject to two restrictions only:[5]

First, A state has no power to enact a bankrupt law im-

[1] *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Hieskill, No. 13594, s. c. Crabbe, 525; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Pr., N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass. 1.

[2] Baldwin v. Hale, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; Tua v. Carriere, 117 U. S. 209.

[2*] Hanover Nat. Bank v. Moyses, 186 U. S. 181; Leidigh Carriage Co. v Stengel, 95 Fed. Rep. 637, 37 C. C. A. 210.

[3] Chief Justice Marshall, in Sturges v. Crowninshield, 4 Wheat. 122. See also Blanchard v. Russell, 13 Mass. 1.

[4] This rule is now well settled by judicial decisions. Sturges v. Crowninshield, 4 Wheat. 122; Tua v. Carriere, 117 U. S. 201; Ogden v Saunders, 12 Wheat. 273, 275, 280, 306, 310, 314, 335, 369; see Hale v. Baldwin, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; and the many cases recognizing the right of the states to pass bankrupt and insolvency laws, when there is no bankrupt law in existence.

An opposite opinion has been entertained by jurists, see Ogden v. Saunders, 12 Wheat. 267 to 270; Golden v. Prince, No. 5509, Fed. Cas., s. c. 3 Wash. C. C. 313.

[5] Sturges v. Crowninshield, 4 Wheat. 120; Farmers and Mechanics Bank v. Smith, 6 Wheat. 130; Ogden v. Saunders, 12 Wheat. 213; Baldwin v. Hale, 1 Wall. 223; Tua v Carriere, 117 U. S. 201; Woodhull v. Wagner, No. 17975, Fed. Cas., s. c. Bald. 296.

pairing the obligation of contracts, whether there is a national bankrupt act or not.

Second, The other restriction depends solely upon the action of congress. The moment it establishes a system of national bankruptcy, the state law, in so far as it is in conflict with the act of congress, is superseded and limited by the national act, so long as it is in force.

§ 11. State bankrupt laws with reference to impairing the obligation of a contract.

The constitution expressly forbids a state passing any law impairing the obligation of a contract.[1] This prohibition applies to bankrupt laws and acts as a general limitation upon the power of the state legislature, whether there is a national bankrupt law in force or not. Yet each state, so long as it does not impair the obligation of any contract, has the power by its laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.[2]

A state has no power to enact a bankrupt law which operates to discharge a debtor from a contract entered into previous to its passage.[3] This is true, whether the parties to the contract are citizens of the same or different states.[4] The reason for this rule is that the effect of such a law is to terminate the obligation under a contract, which was not and could not have been made in view of the statute, because it was not in existence at the time the contract was made.

Whether a state may pass a bankrupt law which shall discharge a debtor from contracts entered into *after* the passage of the act has been the subject of much discussion. From the decisions it may be stated that a fair and ordinary exercise of the power to pass bankrupt laws by the state does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. Whether such a state

[1] U. S. Const., Art. 1, Sec. 10.

[2] Smith v. Union Bank, 5 Pet. 518, 526; Crapo v. Kelly, 16 Wall. 610, 630; Denny v. Bennett, 128 U. S. 489, 498; Walworth v. Harris, 129 U. S. 355; Geilinger v. Philippi, 133 U. S. 246, 257; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 22.

[3] Sturges v. Crowninshield, 4 Wheat. 122; Farmers and Mechanics Bank v. Smith, 6 Wheat. 130.

[4] Farmers and Mechanics Bank v. Smith, 6 Wheat. 130.

statute is repugnant to the constitution or not depends upon the citizenship of the parties to the contract. It was held by a divided court in the case of *Ogden* v. *Saunders*[1] that a state bankrupt law discharging the person and property of the debtor does not violate the obligation of a contract entered into subsequent to its passage by citizens of that state. The reason is, that the citizens of a state are subject to its laws, and contracts made by them within its territory are made with reference to such laws. The principle established by this case has never been overruled nor extended in subsequent cases. It has been uniformly held that a state bankrupt or insolvent law could have no effect upon a contract made, either within or without such state, between citizens of different states.[2] The reason for this is, that the state has no jurisdiction beyond its own territory, and can not affect a contract entered into by a person of another state who can not be presumed to act with reference to the laws of a state of which he is not a citizen. Such state laws are held not to apply to contracts by citizens of the same state unless made within such state.[3] It makes no difference that the contract entered

[1] 12 Wheat. 213. In this case, Saunders, a citizen of New York, drew bills on Ogden in New York, which were accepted and protested there. Ogden was afterwards discharged under the insolvent laws of New York, passed previous to the contract of acceptance. He pleaded this discharge to an action brought against him in the district court of Louisiana. A majority of the court decided that the bankrupt or insolvent law was not a law impairing the obligation of that contract, but overruled his plea of discharge under that act.

See also Springer v. Foster, No. 13266, Fed. Cas., s. c. 2 Story, 383, in which Judge Story stated the settled doctrine of the supreme court to be that no state insolvent law can discharge the obligation of any contract made in the state, except such contracts as are made between citizens of that state. He refers to the case of Ogden v. Saunders, *supra*, to support this proposition.

[2] Boyle v. Zacharie, 6 Pet. 348; Suydam v. Broadnax, 14 Pet. 67; Cook v. Moffatt, 5 How. 295; Baldwin v. Hale, 1 Wall. 223; Springer v. Foster, No. 13266, Fed. Cas., s. c. 2 Story, 383; Woodhill v. Wagner, No. 17975, Fed. Cas., s. c. Baldwin, 296.

[3] McMillan v. McNeill, 4 Wheat. 209. But see Marsh v. Putnam, 3 Gray, 551, where the contracting parties were citizens of the state passing the insolvent law; also Blanchard v. Russell, 13 Mass. 1.

into between a citizen of one state and a citizen of another is made payable where the insolvent law exists.[1]

If, however, the creditor makes himself a party to proceedings under the insolvent law he will be bound by them, like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was excluded by the constitution from being affected by the law.[2]

§ 12. The effect of a national bankrupt law upon state insolvent laws.

Another restriction upon the operation of state insolvent laws arises when congress establishes a system of bankruptcy. As soon as a national bankrupt act goes into effect the state law must yield so far as it conflicts with the act of congress.

It is well settled by the decisions, both federal and state, that the effect of a national bankrupt law is to suspend the operation of any state bankrupt or insolvent law regulating the assignment and distribution of the property of insolvents, and affecting the same persons, property and rights that would be affected by proceedings under the bankrupt act.[3] But the act of congress does not repeal such state laws. They immediately become operative, without reenactment, upon the repeal of the act of congress.[4]

The first inquiry naturally is, when did the bankrupt act of 1898 take effect to suspend the insolvent and bankrupt laws of the several states? Of this there can be little doubt. The act expressly provides that it "shall go into full force and effect upon its passage," which was July 1, 1898. But "no

[1] Baldwin v. Hale, 1 Wall. 223; Baldwin v. Bank of Newberry, 1 Wall. 234; Gillman v. Lockwood, 4 Wall. 409.

[2] Clay v. Smith, 3 Pet. 411; Gilman v. Lockwood, 4 Wall. 409; Baldwin v. Hale, 1 Wall. 223; Perley v. Mason, 64 N. H. 6.

[3] *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Heiskill, No. 13594, s. c. Crabbe, 525; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Pr., N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass, 1; Parmenter Mf. Co. v. Carpenter, 51 N. E. 529; Bruss-Ritter Co., 90 Fed. Rep. 651; *In re* Gutwillig, 90 Fed. Rep. 475.

[4] Baldwin v. Hale, 1 Wall. 223; Butler v. Goreley, 146 U. S. 303; Tua v. Carriere, 117 U. S. 209.

petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof."[1] In this respect the present act differs from that of 1867, which fixed the date at which the act took effect for some purposes as June 1, 1867.[2] It also differs in like respect from the act of August 19, 1841, which provided that the act should take effect from and after the first day of February, 1842.[3] It is expressly provided by the act, however,

[1] Last clause of the Act of July 1, 1898. *In re* Bruss-Ritter Co., 90 Fed. Rep. 651; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. Rep. 691; *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96; *In re* Curtis, 91 Fed. Rep. 737; Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, s. c. 37 C. C. A. 210.

In Parmenter Mf. Co. v. Hamilton, 51 N. E. Rep. 529, the Supreme Judicial Court of Massachusetts, construing the present statute, said:

"The language is materially different from that of the bankruptcy act of 1867 and from that of the earlier bankruptcy law of 1841. The argument that the change in question was intentional is almost irresistible. The act is 'to go into full force and effect upon its passage'; that is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (Sec. 3), to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (Sec. 4), and to have preferences and liens governed by the provisions of it (Secs. 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions, and four months in the case of involuntary petitions. Whenever the proceedings are commenced the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act."

[2] Act of March 2, 1867, 14 Stat. at L. 541, Sec. 50; Traders Bank v. Campbell, 14 Wall. 94; Martin v. Berry, 37 Cal. 208; Day v. Bardell, 97 Mass. 246; Chamberlain v. Perkins, 51 N. H. 340.

[3] Act of August 19, 1841, 5 Stat. at L. 449, Sec. 17; Griswold v. Pratt, 9 Met. 16.

that proceedings commenced under the state insolvency laws before July 1, 1898, shall not be affected by the national act.[1]

The reason that state bankruptcy and insolvency laws are inoperative is not because the proceedings under them are less plenary, but for the sole reason that a different tribunal is selected than that provided by congress.[2] General jurisdiction of bankruptcy proceedings is conferred upon courts specified as courts of bankruptcy.[3] This jurisdiction must necessarily be exclusive of the state courts.[4]

It may be contended that the bankrupt law does not suspend proceedings under the state law until proceedings are instituted in a court of bankruptcy.[5] But if this were so "the law would be imperfect, and all the evils would be experienced of two different systems of distributing the assets of insolvent debtors, with the strongly objectionable feature that one of those systems, the state insolvent law, was of such a character as to be liable to have the proceedings under it superseded by proceedings being instituted under the other at the election of the insolvent or of his creditors, if a case existed for compulsory bankruptcy."[6] Another objection to such a construction is, that it would defeat the very object of the national bankrupt system, namely, uniformity through-

[1] Last clause of the Act of July 1, 1898.

[2] Globe Ins. Co. v. Cleveland Ins. Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, where Judge Emmons used substantially the language of the text.

In Platt v. Preston, No. 11219, s. c. 19 N. B. R. 241, Judge Choate said:

"As to the general assignment, it is insisted that it is not *per se* a fraud upon the bankrupt law, but void if actual intent to defraud or to defeat the law shall be shown. This may still be regarded as being an open question in the supreme court of the United States. Mayer v. Hellman, 91 U. S. 496. But the great weight of authority at present is, that a general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law, defeating the operation of the law, because it provides for the administration of the estate in a different way from that provided by the bankrupt law, and by an assignee selected by the bankrupt himself."

[3] B. A. 1898, Sec. 2. See also Jurisdiction of Courts of Bankruptcy, Sec. 16, *et seq.*, *post.*

[4] R. S. Sec. 711, clause 6.

[5] Bostwick v. Burnett, 74 N. Y. 317; Sadler v. Immel, 15 Nev. 265; Ostrander v. Meunch, 12 Fed. Rep. 562; Reed Brothers & Co. v. Taylor, 32 Iowa, 209.

[6] Judge Dewey, in Griswold v. Pratt, 9 Met. 16; see also cases cited in note next below.

out the United States; some cases would be instituted under the national bankrupt act and others proceed under the laws of the various states, provided no objection was raised to such proceedings in the state court. Clearly it was not the intention of the framers of the constitution or of congress when it enacted this act to have in existence two distinct and diverse systems affecting the same property and rights, leaving it to the option of the debtor to look to one or the other at his pleasure.[1]

Under the act of 1841, as well as under the act of 1867, this question does not appear to have been directly decided by the supreme court of the United States,[2] for the reason

[1] Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; *In re* Klein, 1 How. 277, note; *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Globe Ins. Co.v.Cleveland Ins. Co., 5486, Fed. Cas., s. c. 14 N. B. R. 311; Thornhill v. Bank, No. 13992, Fed. Cas., s. c. 1 Woods, 1; Sullivan v. Hieskill, No. 13594, s. c. Crabbe, 525; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; Rowe v. Page, 54 N. H. 190; Van Nostrand v. Carr, 30 Md. 128; Shears v. Solhinger, 10 Abb. Prac. N. S. 287; Martin v. Berry, 37 Cal. 208; Griswold v. Pratt, 9 Met. 16; Blanchard v. Russell, 13 Mass. 1; Parmenter Mf. Co. v. Hamilton (Mass.), 51 N. E. Rep. 529; Bruss-Ritter Co., 90 Fed. Rep. 651.

See also discussion with reference to general assignment laws next section below.

[2] In Mayer v. Hellman, 91 U. S. 502, the question is referred to, but the court expressly declined to express an opinion.

In Reed v. McIntyre, 98 U. S. 507, the court held that property in the hands of an assignee was not liable to an attachment sued out and levied after the assignment and prior to bankruptcy proceedings.

In Boese v. King, 108 U. S. 379, the court held that creditors, who permitted a debtor to surrender his property for distribution and to proceed under a state insolvent act until they acquired preferences over the other creditors under the bankrupt act, were estopped, in a proceeding by the receiver of such creditors to set aside such distribution to question the legality of the proceeding. But Mr. Justice Matthews, with whom concurred Justices Miller, Gray and Blatchford, dissented upon the ground that the state law being inoperative no title under it could pass, and that the judgment creditors who had acquired a lien upon the fund in the hands of the assignee were entitled to appropriate it as the property of their debtor to the payment of their claims. These decisions, together with decisions of the justices holding the circuit courts, indicate that the supreme court was divided at that time upon the question whether the bankrupt law *ipso facto* made proceedings under the state law invalid.

probably that the supreme court had no appellate jurisdiction in bankruptcy.[1] The weight of authority in the circuit courts (having final jurisdiction of bankruptcy cases) as well as in the state courts, is to the effect that the national bankrupt law of 1867 *ipso facto* suspended all state legislation upon the subject of bankruptcies.[2] The same rule has been applied under the present act.[3]

[1] Cleveland Insurance Co. v. Globe Ins. Co., 98 U. S. 366; N. O., etc., R. Co. v. Delamore, 114 U. S. 506.

[2] Judge Emmons, in the well-considered case of the Globe Insurance Co. v. Cleveland Insurance Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, lays down the rule that "if the state statute authorizes a transfer of all a debtor's property for equal distribution among his creditors, in the language of many of the cases 'acting upon the same persons and property,' a transfer under it is void; not because the proceedings are less plenary, but for the sole reason that a different tribunal is selected than that provided by congress."

See also *In re* Beisenthal, No. 1236, Fed. Cas., s. c. 14 Blatch. 146; *In re* Independent Insurance Co., No. 7017, Fed. Cas., s. c. Holmes, 103; Macdonald v. Moore, No. 8763, Fed. Cas., s. c. 8 Ben. 579; *In re* Reynolds, No. 11723, Fed. Cas., s. c. 9 N. B. R. 50; *In re* Stubbs, No. 13557, Fed. Cas., s. c. 4 N. B. R. 376; Platt v. Preston, No. 11219, s. c. 19 N. B. R. 241; Van Nostrand v. Carr, 30 Md. 128; Rowe v. Page, 54 N. H. 194; Chamberlain v. Perkins, 51 N. H. 340; Martin v. Berry, 37 Cal. 208; Shears v. Solhinger, 10 Abb. Prac., N. S. 287.

But see *contra* Reed Bros. & Co. v. Taylor, 32 Iowa, 209; Cook v. Rogers, 31 Mich. 391; Langley v. Perry, No. 8067, s. c. 2 N. B. R. 596; Sedgwick v. Place, No. 12622, Fed. Cas., 1 N. B. R. 673; Bostwick v. Burnett, 74 N. Y. 317; Sadler v. Immel, 15 Nev. 265.

[3] The Parmenter Manufacturing Co. v. Hamilton, 51 N. E. Rep. 529; *In re* Bruss-Ritter Co., 90 Fed. Rep. 651; *In re* Smith, 92 Fed. Rep. 135; *In re* Curtis, 91 Fed. Rep. 737; Ketcham v. McNamara, 72 Conn. 709; 6 Am. B. R. 160; *In re* Macon Sash Door & Lumber Co., 7 Am. B. R. 66.

In Parmenter Manufacturing Co. v. Hamilton, *supra,* the Supreme Judicial Court of Massachusetts used this language:

"The question in this case is, whether this act so far superseded the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. . . . . .

The plain implication is, that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute."

It is clear that any person or corporation not subject to the act of 1898 may take the benefit of an insolvent state law.[1] Any person who owes debts, except a corporation, may become a voluntary bankrupt.[2] This provision of the act limits the jurisdiction of the state courts to corporations which are not liable to be adjudged bankrupts upon the petition of creditors. Such are, *first*, corporations *not* "engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of $1,000 or over." In this class may be included corporations not for profit, such as religious and benevolent societies, social clubs and municipal corporations; *second,* banks incorporated under state or territorial laws. National banks are also excluded from the operation of the bankrupt act, but congress has provided another method of winding up the affairs of an insolvent national bank.[3]

If proceedings in insolvency are instituted in a state court after the law of 1898 went into effect, by what steps is it possible to transfer the property and proceedings to a court of bankruptcy? Two plain remedies exist. *First*, If it be a case in which the debtor may be adjudged a bankrupt on petition of a creditor—involuntary bankruptcy—proceedings may at once be instituted in a court of bankruptcy by the creditors. Such proceedings supersede the proceedings in the state court.[3*] If the state court refuses to yield, the question of how far a court of bankruptcy may interfere with a state court arises. This is discussed in another place.[4] *Second*, If the case in the state court is not properly within involuntary bankruptcy, under the act of 1898, but is a case within the voluntary provisions of that act, the procedure is different. Clearly a person can not be directly compelled to voluntarily go into a court of bankruptcy. If the state court holds jurisdiction after a proper objection has been made by any of the creditors, the case may be taken to the highest court of the state in which it is reviewable. If such court decides

[1] As to who may be adjudged bankrupts under the Act of 1898, see Secs. 42, *et seq., post.*

[2] B. A. 1898, Secs. 4*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[3] R. S. Secs. 5220 to 5243.

[3*] *In re* Macon Sash, Door & Lumber Co., 7 Am. B. R. 66; Ketcham v. McNamara, 6 Am. B. R. 160, 72 Conn. 709.

[4] How far a court of bankruptcy may interfere with a state court, Secs. 22 and 23, *post.*

in favor of the jurisdiction of the state court, this decision may be reviewed by the supreme court of the United States.[1]

§ 13. The effect of a national bankrupt law upon general assignment laws of the states.

Under the act of 1841 is was generally conceded that a general assignment for the benefit of creditors was unlawful from and after the date that the act went into effect.[2] Under the act of 1867 a difference of opinion existed with reference to the effect of the act upon state laws regulating assignments for the benefit of creditors.[3]

It will be observed that it is insolvent and bankrupt laws only which are suspended by the act of 1898. A state statute which is merely declarative of principles of enforcing a trust substantially such as a court of chancery would apply in the absence of any statutory provision is not such a law.[4]

There is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the courts, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy,

[1] R. S. Sec. 709.

[2] See McLean v. Johnson, No. 8883, Fed. Cas., s. c. 3 McLean, 202; McLean v. Meline, No. 8890. Fed. Cas., s. c. 3 McLean, 199; *Ex parte* Eames, No. 4237, Fed. Cas., s. c. 2 Story, 322; Griswold v. Pratt, 9 Met. 16; *In re* Breneman, No. 1830, Fed. Cas., s. c. Crabbe, 456.

Speaking of this act, Judge Emmons, in Globe Insurance Co. v. Cleveland Insurance Co., No. 5486, Fed. Cas., s. c. 14 N. B. R. 311, observes:

"Under the law of 1841 several decisions of this precise question were made. During the administration of that law, when at the bar, we had occasion to examine it. Few doctrines were more generally acquiesced in at that time than that general assignments for the benefit of creditors had become unlawful. Every lawyer of large practice will be enabled to say that the practice was abandoned throughout the country. The local judgments were then less frequently reported than now, or they would have been as numerous in the books as they are under the law of 1867." But see *ex parte* Ziegenfuss, 2 Iredell (N. Car.) 463.

[3] See note 2, page 27.

[4] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Watts and Sachs, 190 U. S. 1; Mayer v. Hellman, 91 U. S. 502. The Ohio law was under consideration in this last case.

and such is undoubtedly superseded by the act of congress in question.[5] The other derives its potency, not from the law, but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations.

Proceedings therefore under a general assignment law of a state (not a bankruptcy or insolvency law strictly so-called) or under a common law deed are not void, whether bankruptcy proceedings are instituted or not.[6] If no bankruptcy proceeedings are instituted within four months the state court may proceed to administer the estate and the proceedings cannot be assailed by a trustee in bankruptcy subsequently appointed or by the creditors.[7]

The bankruptcy act makes a general assignment for the benefit of creditors [8] or the appointment of a receiver by a state court [9] an act of bankruptcy. It has been held that an assignee, under a deed of general assignment and the execution of which deed is the act of bankruptcy upon which an adjudication is made although the assignee has qualified and is acting under the orders of the state court, does not hold the estate of the bankrupt adversely to the trustee in bankruptcy.[10] If proceedings in bankruptcy are instituted within four months after the general assignment or the appointment of the receiver

[5] Parmenter Manf. Co. v. Hamilton, 51 N. E. Rep. 528; *In re* Smith, 92 Fed. Rep. 135; *In re* Etheridge Furniture Co., 92 Fed. Rep. 329; *In re* Richard, 94 Fed. Rep. 633; Ketcham v. McNamara, 72 Conn. 709, 6 Am. B. R. 160; *In re* Macon Sash, Door & Lumber Co., 7 Am. B. R. 66. But see Boese v King, 108 U. S. 379.

[6] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Sievers, 91 Fed. Rep. 366; *In re* Romanow, 92 Fed. Rep. 510; 1 Am. B. R. 461.

[7] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; Mayer v. Hellman, 91 U. S. 496; Boese v. King, 108 U. S. 379; Patty-Joiner & Enbank Co. v. Cummins, (Texas Sup. Ct.) 4 Am. B. R. 269, 57 S. W. Rep. 566.

[8] B. A. 1898, Sec. 3, as amended Feb. 5, 1903, 32 Stat. at L. 797; West Co. v. Lea, 174 U. S. 590.

[9] B. A. 1898, Sec. 3, clause 4, as amended by the act of February 5, 1903, 32 Stat. at L. 797.

[10] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 645; 2 Am. B. R. 383.

As to when a receiver does not

such state proceedings are void as against the trustee of the bankrupt so far as it interferes with his administration of the property of the debtor.[11]

The general rule is that where the property of a debtor has gone into the custody of a state court, its right to control and administer it for the purpose of that suit is superior to that of the bankruptcy court, provided such suit was commenced and the seizure made before the beginning of the four months period.[12] If the suit in the state court was begun and the seizure made within that period the right of the bankruptcy court over the property is not only superior, but after the adjudication is exclusive, providing proper steps are taken by the trustee to obtain possession of the property for the purpose of administering it.[13] The trustee should apply to the state court for an order to deliver to him the assets of the debtor.[14] The state court will regularly pass such an order in a proper case.

hold adversely, see *In re* Watts & Sachs, 190 U. S. 1.

[11] Randolph v. Scruggs, 190 U. S. 533, 10 Am. B. R. 1; West Co. v. Lea, 174 U. S. 590; Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; Armour Packing Co. v. Brown (Minn.), 79 N. W. Rep. 522; Lumber Co. v. Sawyer (Minn.), 78 N. W. Rep. 1038.

[12] Consult Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177; Frazier v. Southern Loan & Trust Co., 99 Fed. 707; 40 C. C. A. 76, where the suits in the state courts had been instituted more than four months before the commission of the acts of bankruptcy, and consequently the state courts were not deprived of jurisdiction over the property.

In Pickens v. Roy, 187 U. S. 180, the court, in referring to the rules governing cases of priority of jurisdiction, imputes to Judge Goff the following language, which is approved:

"The bankruptcy act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

Though there is error in the citation, as Judge Goff did not sit in Frazier v. Southern Loan & Trust Co., 99 Fed. 707; 40 C. C. A. 76, the language is found in Pickens v. Dent, 106 Fed. 657; 45 C. C. A. 522, the decision in which was under review in Pickens v. Roy, and there affirmed.

[13] *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35.

[14] *In re* Knight, 125 Fed. Rep. 35; *In re* Watts & Sachs, 190 U. S. 1.

If the state court refuses to order its assignee for the benefit of creditors to deliver assets in his possession to the trustee in bankruptcy, the trustee may apply to the court of bankruptcy for an order to bring in the assignee under the assignment, which constitutes an act of bankruptcy, and require him to deliver to the trustee assets of the estate which came into his possession under the assignment,[15] but the assignee cannot be required by a summary order on notice to pay over money, which he has paid out in the administration of the estate in the state court,[16] or the trustee may proceed to have the conveyance to the assignee set aside under Sec. 67*e*,[17] or he may apply to the court of bankruptcy for an order to stay proceedings in the state court.[18]

[15] Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623; *In re* Thompson, 122 Fed. Rep. 174; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312; *In re* Knight, 125 Fed. Rep. 35.

[16] Louisville Trust Co. v. Comingor, 184 U. S. 18, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A., 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; *In re* Klein & Co., 8 Am. B. R. 559, 116 Fed. Rep. 523; *In re* Carver & Co., 7 Am. B. R. 539; *In re* Manning, 10 Am. B. R. 497.

[17] Randolph & Scruggs, 190 U. S. 533, 10 Am. B. R. 1; *In re* Gutwillig, 90 Fed. Rep. 475, s. c. 92 Fed. Rep. 337; Davis v. Bohle, 92 Fed. Rep. 325.

[18] *In re* Watts & Sachs, 190 U. S. 1; *In re* Knight, 125 Fed. Rep. 35.

CHAPTER III.

THE COURTS OF BANKRUPTCY AND THEIR TERRITORIAL JURISDICTION.

§ 14. Bankruptcy courts created.

The statute creates courts of bankruptcy by conferring jurisdiction in bankruptcy on the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska.[1]

The jurisdiction in bankruptcy is conferred upon existing courts instead of being vested in new tribunals. But these courts, when acting as courts of bankruptcy, are none the less separate and distinct courts, and exercise powers and jurisdiction separate and distinct from their powers and jurisdiction as originally constituted, to the same extent as if they were separate and distinct tribunals.[2]

The courts of bankruptcy are courts of record, having a limited jurisdiction, but are not inferior courts, in the technical sense of those words, whose judgments, taken alone are to be disregarded.[3]

§ 15. Territorial jurisdiction.

The several courts of bankruptcy have the same territorial limits respectively as the courts upon which bankruptcy jurisdiction is conferred now have, or as they may hereafter be changed.[4] Each state and territory is divided into judicial districts. In many states there are two or more districts,

[1] B. A. 1898, Sec. 1, clause 8, and Sec. 2.

[2] See Norris' Case No. 10304, Fed. Cas., s. c. 4 N. B. R. 35.

[3] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411; Kennedy v. Bank, 8 How. 586; *In re* Williams, 120 Fed. Rep. 38.

[4] B. A. 1898, Sec. 2.

and some of the large districts are again divided into divisions. When a district consists of a state, its boundaries vary as those of the state vary.[5] A court of bankruptcy is established by the act of 1898 in each judicial district, whether it consists of one or more divisions.

A court of bankruptcy, like a court of equity, is deemed always open for filing papers, issuing process, making orders, etc. The Bankruptcy Act seems to contemplate that from the filing of the petition to the closing of the estate, the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered and which have no terms.[6] Bankruptcy proceedings may be entertained and determined in vacation, in chambers, and during the respective terms of the courts created courts of bankruptcy.

The time and place of holding the several district courts are given below, in connection with the counties comprising the several districts. It has been found necessary in many districts, where court is held at different places in the district, to designate certain days, in addition to the regular term days, on which the judge will be present at these several places for the purpose of hearing bankruptcy matters.

The judicial districts by states are as follows:

ALABAMA (fifth circuit) is divided into three districts, called the northern, middle and southern districts.

The northern district is divided into four divisions, called the northern, southern, eastern and western divisions of the northern district.

The northern division of the northern district consists of the counties of Colbert, Cullman, Franklin, Jackson, Lauderdale, Lawrence, Limestone, Madison, Marion, Marshall, Morgan, and Winston.

The southern division of the northern district consists of

[5] *Ex parte* Devoe Manufacturing Co., 108 U. S. 401, 27 L. Ed. 764.

[6] *In re* Ives (C. C. A., 6th Cir.), 7 Am. B. R. 692, 113 Fed. Rep. 911; *In re* Lemon Gale Co. (C. C. A., 6th Cir.), 112 Fed. Rep. 696, 7 Am. B. R. 291; *In re* Bimberg, 121 Fed. Rep. 942, 9 Am. B. R. 601.

the counties of Blount, Dekalb, Fayette, Jefferson, Lamar, St. Clair, Shelby, and Walker.

The eastern division of the northern district consists of the counties of Calhoun, Cherokee, Clay, Cleburne, Etowah, and Talladega.

The western division of the northern district consists of the counties of Bibb, Greene, Pickens, Sumter, Tuscaloosa.

The time and place of holding district courts for the northern division are the first Tuesday in April and second Tuesday in October, at Huntsville; for the southern division the first Mondays in March and September, at Birmingham; for the eastern division the first Monday in May and November, at Anniston; for the western division the first Tuesday in January and June, at Tuscaloosa.

The middle district consists of the counties of Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Coffee, Coosa, Covington, Crenshaw, Dale, Elmore, Geneva, Houston, Henry, Lee, Lowndes, Macon, Montgomery, Pike, Randolph, Russell and Tallapoosa.

The time and place of holding the district court of this district are the first Tuesdays of May and December, at Montgomery. A session of this court is also held on the first Monday of each month, under rules adopted.

The southern district is divided into two divisions called the northern and southern divisions of the southern district.

The northern division of the southern district consists of the counties of Dallas, Hale, Marengo, Perry and Wilcox.

The southern division of the southern district consists of the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe and Washington.

The district court is held the fourth Monday of November and the first Monday of May, at Mobile; first Monday in May and first Monday in November, at Selma.

Alaska (ninth circuit). The district comprises the entire territory and is divided into three divisions.

The first division includes all of that portion of Alaska

east of the one hundred and forty-first degree of west longitude.

At least four terms of court in the division each year—two at Juneau and two at Skagway—and the judge shall, as near January 1 as practicable, designate the time of holding the terms during the current year.

Recording districts: Wrangell, No. 1; Juneau, No. 2; Skagway, No. 3; Sitka, No. 4; Kodiak, No. 5; Valdes, No. 6; Porcupine, No. 7; Ketchikan, No. 8.

The second division of Alaska consists of all that territory lying west, northwest, and north of that certain line described as follows: Commencing at the mouth of the Colville River, on the north coast of the district of Alaska; thence following the Colville River south and west to a point where said river crosses the one hundred and fifty-fourth meridian line the second time; thence following the one hundred and fifty-fourth meridian line south to the west side of Tohtankella Mountain and to the Yukon River; thence in a southeasterly direction to the western side of Mount McKinley; thence in a southwesterly direction to the most northern point of Lake Clark; thence along the northwest side of Lake Clark to the sixtieth degree of north latitude; thence west along said degree of latitude to Kuskokwim Bay. This division also includes the mainland west of said bay and all of the islands north of the fifty-ninth degree of north latitude.

There shall be at least one term of court each year at St. Michael, beginning the third Monday in June. Special term at Council each year at a time fixed by the court. Special terms held at Nome as the business requires.

The third division consists of all that portion of Alaska not included within the first or second divisions.

At least one term of court is held each year at Eagle, beginning on the first Monday in July. Special terms are held at times and places as the judge or attorney general may direct. Special terms have been held at Eagle, Circle City, Fairbanks, Nushagak, Valdez, Rampart and Coldfoot.

ARIZONA (ninth circuit) is divided into five districts. The counties in the district are:

First judicial district: Pima and Yuma.

Second judicial district: Cochise and Santa Cruz.

Third judicial district: Maricopa and Pinal.

Fourth judicial district: Apache, Coconino, Mohave, Navajo and Yavapai.

Fifth judicial district: Graham and Gila.

Times and places of holding courts are: Supreme court: Second Monday in January each year at Phœnix.

First judicial district: Fourth Mondays in April and October, at Tucson.

Second judicial district: Fourth Mondays in April and October, at Tombstone.

Third judicial district: Third Mondays in April and October, at Phœnix.

Fourth judicial district: First Mondays in May and November, at Prescott.

Fifth judicial district: First Mondays in April and October, at Solomonville.

ARKANSAS (eighth circuit) is divided into two districts called the eastern and western districts.

The eastern district is divided into three divisions, called the eastern, northern and western divisions.

The eastern division of the eastern district (returnable to Helena) includes the counties of Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, St. Francis and Monroe.

The northern division of the eastern district (returnable to Batesville) consists of the counties of Independence, Cleburne, Stone, Izard, Sharp, Fulton, Randolph, Lawrence and Jackson.

The western division of the eastern district (returnable to Little Rock) includes the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Springs, Jefferson, Lincoln,

Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, White and Woodruff.

The time and place of holding district courts are the fourth Monday in May and second Monday in December, at Batesville; the second Monday in March and first Monday in October, at Helena; and the first Monday in April and third Monday in October, at Little Rock.

The western district is divided into the Texarkana division, the Harrison division and the Fort Smith division.

The Texarkana division of the western district includes the counties of Sevier, Howard, Pike, Little River, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Calhoun and Union.

The Fort Smith division of the western district comprises the counties of Benton, Crawford, Franklin, Johnson, Logan, Polk, Sebastian, Scott, Washington and Yell.

The Harrison division of the western district consists of the counties of Baxter, Boone, Carroll, Madison, Marion, Newton and Searcy.

The time and place of holding the districts courts are: At Texarkana, second Mondays in May and November; at Fort Smith, second Mondays in January and June; at Harrison, second Mondays in April and October.

California (ninth circuit) is divided into two districts called the northern and southern districts.

The counties in the northern district are Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehema, Trinity, Tuolumne, Yolo and Yuba.

The time and place of holding district courts are: San Francisco, first Monday in March, second Monday in July and first Monday in November; at Eureka, third Monday in July.

The southern district is divided into two divisions, the northern and southern divisions.

The northern division of the southern district consists of the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced and Tulare.

The southern division of the southern district consists of the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara and Ventura.

The time and place of holding district court for the northern division are the first Monday in May and second Monday in November, at Fresno; for the southern division the second Mondays in January and July, at Los Angeles.

COLORADO (eighth circuit) constitutes one judicial district.[8] Suits removed from state courts in Archuleta, Conejos, Costilla, Dolores, La Plata, Mineral, Montezuma, Rio Grande and San Juan counties shall be filed at Del Norte. Suits removed from state courts in Baca, Bent, Chaffee, Custer, Delta, Fremont, Gunnison, Hinsdale, Huerfano, Kiowa, Las Animas, Mesa, Montrose, Otero, Ouray, Prowers, Pueblo and San Miguel counties shall be filed at Pueblo. Suits removed from state courts in counties not specified above shall be filed at Denver. Bankruptcy proceedings from these counties should be filed in the same court as suits removed from a state court.

The time and place of holding district courts are: At Denver, first Tuesdays in May and November; at Pueblo, first Tuesday in April; at Montrose, second Tuesday in September.

CONNECTICUT (second circuit) constitutes one judicial district.

The district court is held at New Haven on the fourth Tuesdays in February and August; at Hartford, fourth Tuesday in May and the first Tuesday in December.

DELAWARE (third circuit) constitutes one judicial district.

The district court is held on the second Tuesdays in January, April, June and September, at Wilmington.

[8] Act of June 26, 1876, 19 Stat. at L. 61.

THE DISTRICT OF COLUMBIA. The district comprises all the District of Columbia.

The supreme court is held on the first Mondays in January, April and October.

FLORIDA (fifth circuit) is divided into two districts, called the northern district and the southern district.

The northern district embraces the counties of Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levi, Liberty, Santa Rosa, Taylor, Wakulla, Walton and Washington.

The time and place of holding district courts are first Monday in February, at Tallahassee; first Monday in March, at Pensacola.

The counties of the southern district are Alachua, Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, Duval, Hamilton, Lake, Madison, Marion, Nassau, Orange, Osceola, Putnam, St. Johns, Sumter, Suwannee, Volusia, Monroe, Manatee, Lee, De Soto, Hillsboro, Hernando, Polk and Pasco.

The time and place of holding district courts are second Monday in February, at Tampa; first Mondays in May and November, at Key West; first Monday of December, at Jacksonville; third Monday in January, at Ocala; fourth Monday in April, at Miami; first Monday in April, at Fernandina.

GEORGIA is divided into two districts, the northern district and the southern district.

The northern district is divided into four divisions, called the eastern division of the northern district, the western division of the northern district, the northern division of the northern district and the northwestern division of the northern district.

The eastern division of the northern district comprises the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Walton, Stephens and White.

The time and place of holding district courts are at Athens on fourth Monday in April and first Monday in November.

The western division of the northern district comprises the counties of Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup and Webster.

The district courts of this division are held at Columbus on first Mondays in May and December.

Northern division of the northern district comprises the following counties of Campbell, Carroll, Cherokee, Clayton, Cobb, Coweta, Dawson, Dekalb, Douglas, Fannin, Fayette, Forsyth, Fulton, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns and Union.

The time and place of holding district courts are at Atlanta, first Mondays in October and second Mondays in March.

Northwestern division of the northern district consists of the counties of Bartow, Catoosa, Chattooga, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker and Whitfield.

The time and place of holding district courts are at Rome, third Mondays in May and November.

The southern district is divided into five divisions, called the eastern division of the southern district, the western division of the southern district, the northeastern division of the southern district, the southwestern division of the southern district and the Albany division of the southern district.

The eastern division of the southern district comprises the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Liberty, Montgomery, McIntosh, Screven, Tattnall and Wayne.

The district court is held at Savannah, second Tuesdays in February, May, August and November.

The western division of the southern district comprises the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooley, Hancock, Houston, Jasper, Jeff Davis, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox and Wilkinson.

The district court of this division is held at Macon, first Mondays in May and October.

The northeastern division of the southern district comprises the counties of Burke, Columbia, Glascock, Jefferson, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes and Warren.

The district court of this division is held at Augusta on the first Monday in April and the third Monday in November.

The southwestern division of the southern district comprises the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, Thomas and Ware.

The district court of this division is held at Valdosta, second Mondays in June and December.

The Albany division of the southern district consists of the counties of Baker, Calhoun, Colquitt, Crisp, Dougherty, Lee, Miller, Mitchell, Tift, Turner and Worth.

The district court of this division is held at Albany, third Mondays in June and December.

Hawaii (ninth circuit) constitutes one judicial district. It compromises the islands of Hawaii, Kahoolawe, Kauai, Lanie, Mauie, Molokai, Niihau, Oahu, and a number of uninhabited islands.

The time and place of holding district courts are at Honolulu the second Mondays in April and October, and at Hilo the last Wednesday in January. Special terms may be held at such times and places as the judge may deem expedient.

Idaho (ninth circuit) constitutes one judicial district. It is divided into three divisions, called the northern, central and southern divisions.

The northern division comprises the counties of Latah, Nez Perces, Idaho, Shoshone and Kootenai.

The district court of this division is held at Moscow, second Monday in May and fourth Monday in October.

The central division comprises the counties of Ada, Lincoln, Blaine, Boise, Canyon, Cassia, Elmore, Owyhee and Washington.

The district court of this division is held at Boise, second Mondays in March and September.

The southern division comprises the counties of Bear Lake, Bingham, Bannock, Custer, Fremont, Lemhi and Oneida.

The district court of this division is held at Pocatello on the second Monday in April and the first Monday in October.

ILLINOIS (seventh circuit) has three districts called the northern, southern and eastern districts.

The northern district is divided into two divisions, the eastern and western divisons of the northern district.

The eastern division of the northern district comprises the counties of Cook, Dekalb, Du Page, Grundy, Kane, Kendall, Lake La Salle, McHenry and Will.

The time and place of holding district courts of this division are on the first Monday in July and the third Monday in December, in Chicago.

The western division of the northern district comprises the counties of Boone, Carroll, Lee, Jo Daviess, Ogle, Stephenson, Whiteside and Winnebago.

The time and place of holding district courts of this division are on third Mondays in April and October, at Freeport.

"Adjourned terms" (created by rule of court): Chicago, first Mondays in March, May and October.

The southern district is divided into two divisions, the northern and southern divisions of the southern district.

The northern division of the southern district comprises the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, Marshall, McDonough, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren and Woodford.

The district courts of this division are held on the third Mondays in April and October, in Peoria.

The southern division of the southern district comprises the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Madison, Mason, McLean, Manard, Morgan, Montgomery, Pike, Sangamon, Schuyler and Scott.

The district courts of this division are held on the first

Mondays in January and June, at Springfield; first Monday in September, at Quincy.

The eastern district of Illinois embraces the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Moultrie, Marion, Massac, Monroe, Perry, Piatt, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Shelby, Union, Vermillion, Wabash, Washington, Wayne, White and Williamson.

The time and place of holding district courts of this district are the first Mondays in March and September, at Danville; first Mondays in April and October, at Cairo; and first Mondays in May and November, at East St. Louis.

INDIANA (seventh circuit) constitutes one judicial district.

The time and place of holding district courts are the first Tuesdays in May and November, at Indianapolis; first Mondays in January and July, at New Albany; first Mondays in April and October, at Evansville; second Tuesdays in June and December at Fort Wayne; third Tuesdays in April and October, at Hammond.

INDIAN TERRITORY* (eighth circuit) is divided into three districts, called the western, central and southern districts.

The western division comprises the Creek and Seminole nations, and portions of the Cherokee and Choctaw nations adjacent to the eastern and southern boundary of the Creek nation.

The time and place of holding courts are: At Eufaula, fourth Monday in January and third Mondays in February and November; at Muscogee, second Mondays in January and April and first Monday in October; at Okmulgee, second Monday in January and first Mondays in February and November; at Sapulpa, third Monday in March, fourth Monday in May and first Monday in December; at Wagoner, first Monday in March, fourth Monday in April and second Monday in December; at Wewoka, second Mondays in April and May and

*See Oklahoma State *post.*

fourth Monday in October; at Tulsa, second Monday in February, first Monday in June and third Monday in September.

The central district comprises the Choctaw nation and a small portion of the southeast part of the Chickasaw nation. The time and place of holding district courts are: Antlers, third Monday in March, second Monday in September and first Monday in December; Atoka, first Monday in January, third Monday in April and first Monday in October; Durant, third Monday in February, the first Monday in June and the second Monday in November; Poteau, third Mondays in January, April and October; South McAlester, first Monday in February, May and November; Wilburton, first Mondays in January, April and October.

The southern district comprises all of the Chickasaw nation, except a small portion of southeast part of same, which is attached to central district.

Iowa (eighth circuit) is divided into two districts, called the northern and southern districts.

The northern district of Iowa is divided into four divisions, the eastern division of the northern district, the Cedar Rapids division of the northern district, the central division of the northern district, and the western division of the northern district.

The eastern division of the northern district comprises the counties of Allamakee, Blackhawk, Bremer, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Floyd, Howard, Jackson, Mitchell and Winneshiek.

The district courts of the eastern division are held at Dubuque on the fourth Tuesday in April and the first Tuesday in December.

The Cedar Rapids division of the northern district embraces the counties of Benton, Cedar, Grundy, Hardin, Iowa, Johnson, Jones, Linn and Tama.

The district courts of the Cedar Rapids division are held on the first Tuesday in April and the second Tuesday in September, at Cedar Rapids.

The central division of the northern district comprises the counties of Butler, Calhoun, Cerro Gordo, Emmet, Franklin, Hamilton, Hancock, Humboldt, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth and Wright.

The district courts of the central division of the northern district are held at Fort Dodge on the second Tuesday in June and the second Tuesday in November.

The western division comprises the counties of Buena Vista, Cherokee, Clay, Dickinson, Ida, Lyon, Monona, O'Brien, Osceola, Plymouth, Sac, Sioux and Woodbury.

The district courts of the western division are held at Sioux City on the fourth Tuesday in May and the first Tuesday in October.

The southern district of Iowa is divided into five divisions, called the eastern division of the southern district, the central division of the southern district, the western division of the southern district, the southern division of the southern district and the Davenport division of the southern district.

The counties in the eastern division of the southern district are Appanoose, Davis, Des Moines, Henry, Jefferson, Lee, Louisa, Van Buren and Wapello.

The district court of the eastern division is held at Keokuk on the second Tuesday in April and the third Tuesday in October.

The counties in the central division of the southern district are Boone, Dallas, Greene, Guthrie, Jasper, Madison, Mahaska, Marion, Marshall, Monroe, Polk, Poweshiek, Story and Warren.

The district courts of the central division of the southern district are held at Des Moines on the second Tuesday in May and the third Tuesday in November.

The western division of the southern district comprises the counties of Audubon, Carroll, Cass, Crawford, Harrison, Mills, Montgomery, Pottawattamie and Shelby.

District courts held at Council Bluffs on the second Tuesday in March and third Tuesday in September.

The southern division of the southern district comprises the

counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringold, Taylor, Union and Wayne.

The district courts of this division are held at Creston on the fourth Tuesday in March and the first Tuesday in November.

The Davenport division of the southern district comprises the counties of Clinton, Keokuk, Muscatine, Scott and Washington.

The district courts of this division are held at Davenport on the fourth Tuesday in April and the first Tuesday in October.

KANSAS (eighth circuit) constitutes one judicial district.

It is divided into three divisions, called the first, second and third divisions.

The first division includes the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington and Wyandotte.

The district court is held at Topeka on the second Monday in April, at Leavenworth on the second Monday in October, second Monday in May at Salina, and at Kansas City on the second Monday of January and first Monday of October.

The second division includes the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Haskell, Hodgeman, Kearny, Kingman, Kiowa, Lane, McPherson, Meade, Morton, Ness, Pawnee, Pratt, Reno, Rice, Rush, Scott, Sedgwick, Seward, Stafford, Stanton, Stevens, Sumner and Wichita.

The district courts of the second division are held on the second Monday in March and the second Monday in September at Wichita.

The third division comprises the counties of Allen, Anderson, Bourbon, Chautauqua, Cherokee, Coffey, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson and Woodson.

The district courts for the third division are held on the first Monday in May and the second Monday in November, at Fort Scott.

KENTUCKY (sixth circuit) is divided into two districts, called the eastern district and the western district.

The eastern district comprises the counties of Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe and Woodford.

The time and place of holding district courts in this district: Frankfort, second Monday in March and fourth Monday in September; Covington, first Monday in April and third Monday in October; Richmond, fourth Monday in April and second Monday in November; London, second Monday in May and fourth Monday in November; Catlettsburg, fourth Monday in May and second Monday in December.

The western district comprises the counties of Adair, Allen, Ballard, Barren, Breckinridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Christian, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hardin, Hart, Henderson, Hickman, Hopkins, Jefferson, Larue, Livingston, Logan, Lyon, McCracken, McLean, Marion, Marshall, Meade, Metcalfe, Monroe, Muhlenberg, Nelson, Ohio, Oldham, Russell, Simpson, Spencer, Taylor, Todd, Trigg, Union, Warren, Washington and Webster.

Time and place of holding courts: Louisville, second Mondays in March and October; Paducah, third Monday in April and third Monday in November; Owensboro, first Monday in May and fourth Monday in November; Bowling Green, third Monday in May and second Monday in December.

LOUISIANA (fifth circuit) is divided into two districts, called the eastern and western districts.

The eastern district is divided into two divisions, the New Orleans division and the Baton Rouge division.

The New Orleans division comprises the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, St. Bernard, St. Charles, St. James, St. John the Baptist, St. Mary, St. Tammany, Tangipahoa, Terrebonne and Washington.

The district court is held at New Orleans the third Mondays in February, May and November.

The Baton Rouge division includes the parishes of Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, St. Helena, West Baton Rouge and West Feliciana.

The district court is held at Baton Rouge on the second Mondays in April and November.

The western district is divided into five divisions, the Alexandria, Monroe, Opelousas, Shreveport and Lake Charles divisions.

The Alexandria division comprises the parishes of Avoyelles, Catahoula, Grant, Rapides and Winn.

The district court is held at Alexandria the fourth Mondays in January and June.

The Monroe division comprises the parishes of Caldwell, Concordia, East Carroll, Franklin, Jackson, Lincoln, Madison, Morehouse, Ouachita, Richland, Tensas, Union and West Carroll.

The district courts is held at Monroe the first Mondays in April and October.

The Opelousas division comprises the parishes of Lafayette, St. Landry, St. Martin and Vermillion.

The district court is held at Opelousas the first Mondays in January and June.

The Shreveport division comprises the parishes of Bossier, Bienville, Caddo, Claiborne, De Soto, Natchitoches, Red River, Sabine and Webster.

The district court is held at Shreveport the third Mondays in February and October.

The Lake Charles division comprises the parishes of Acadia, Calcasieu, Cameron and Vernon.

The district court is held at Lake Charles the third Mondays in May and December.

MAINE (first circuit) constitutes one judicial district.

The district court is held on the first Tuesdays in February and December, at Portland; first Tuesday in June, at Bangor; first Tuesday in September, at Bath.

MARYLAND (fourth circuit) constitutes one judicial district.

The district court is held on the first Tuesdays in March, June, September and December, at Baltimore.

MASSACHUSETTS (first circuit) constitutes one judicial district.

The district court is held on the third Tuesday in March, fourth Tuesday in June, second Tuesday in September and first Tuesday in December, at Boston.

MICHIGAN (sixth circuit) is divided into two districts, called the eastern and western districts.

The eastern district is divided into two divisions, called the northern division of the eastern district, and the southern division of the eastern district.

The northern division of the eastern district comprises the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee and Tuscola.

The district courts for the northern division are held at Bay,

City on the first Tuesdays in May and October. Terms of court at Port Huron are held in the discretion of the judge.

The southern division of the eastern district includes the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw and Wayne.

The time and place of holding district courts in the southern division of the eastern district are at Detroit on the first Tuesdays in March, June and November.

The western district is divided into two divisions, called the northern division of the western district, and the southern division of the western district.

The northern division of the western district includes the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon and Schoolcraft.

The district court is held at Marquette on the first Tuesdays in May and September.

The southern division of the western district embraces the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanaw, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren and Wexford.

The district court is held at Grand Rapids on the first Tuesdays in March and October.

Minnesota (eighth circuit) constitutes one judicial district, divided into six divisions, called the first, second, third, fourth, fifth and sixth divisions.

The first division comprises the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore and Houston.

The district courts are held in the first division on the third Tuesday in May and the third Tuesday in November, at Winona.

The counties which comprise the second division are Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone,

Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley and Lac qui Parle.

The district court of the second division is held on the fourth Tuesday in April and the fourth Tuesday in October, at Mankato.

The third divisions is composed of he counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice and Scott.

The district court for the third division is held on the first Tuesdays in June and December, at St. Paul.

The fourth division consists of the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne and Isanti.

The district court for the fourth division is held on the first Tuesdays in April and October, at Minneapolis.

The fifth division comprises the counties of Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Millelacs, Morrison and Benton.

The district court for the fifth division is held on the second Tuesdays in January and July, at Dúluth.

The sixth division comprises the counties of Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Ottertail, Wilkins, Clay, Becker, Wadena, Norman, Polk, Marshall, Kittson, Clearwater, Beltrami and Hubbard.

The district court for the sixth division is held on the first Tuesday in May and the second Tuesday in November, at Fergus Falls.

Mississippi (fifth circuit) has two districts, a northern and a southern district.

The northern district is divided into two divisions, called the eastern division of the northern district, and the western division of the northern district.

The eastern division of the northern district comprises the counties of Alcorn, Attala, Chickasaw, Clay, Choctaw, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo and Winston.

The western division of the northern district comprises the counties of Benton, Calhoun, Carroll, Coahoma, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster and Yalobusha.

The district courts of the northern district are held on the first Mondays in June and December, at Oxford, and on the first Mondays in April and October, at Aberdeen.

The counties of the southern district of Mississippi are:

(Jackson division) Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson and Yazoo.

(Vicksburg division) Warren, Issaquena, Sharkey, Washington, Bolivar, Claiborne and Sunflower.

(Biloxi division) Harrison, Hancock, Jackson, Marion, Perry, Greene and Pearl River.

(Meridian division) Kemper, Noxubee, Neshoba, Wayne, Clarke, Jasper, Jones, Leake, Lauderdale and Newton.

The time and place of holding district courts in the southern district of Mississippi are at Jackson, first Mondays in May and November; at Vicksburg, first Mondays in January and July; at Biloxi, third Mondays in February and August; at Meridian, second Mondays in March and September.

Missouri (eighth circuit) has two districts, called the eastern and western districts.

The eastern district of Missouri is divided into three divisions, called, respectively, the eastern division of the eastern district, the southeastern division of the eastern district and the northern division of the eastern district.

The eastern division of the eastern district of Missouri comprises the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Montgomery, St. Charles, St. Francois, Ste. Genevieve, St. Louis, Warren, Washington and St. Louis City.

The district court is held at St. Louis, on the first Mondays in May and November.

The southeastern division of the eastern district comprises the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Oregon, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard and Wayne.

The district court is held at Cape Girardeau, on the second Mondays in April and October.

The northern division of the eastern district of Missouri comprises the counties of Marion, Macon, Randolph, Monroe, Lewis, Schuyler, Scotland, Adair, Pike, Ralls, Knox, Chariton, Linn, Shelby and Clark.

The district court of the northern division of the eastern district is held at Hannibal, on the fourth Monday in May and the first Monday in December.

The western district of Missouri is divided into five divisions, called, respectively, the western division of the western district, the St. Joseph division of the western district, the central division of the western district, the southern division of the western district and the southwestern division of the western district.

The western division of the western district contains the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, St. Clair, Saline and Sullivan.

The St. Joseph division of the western division embraces the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Harrison, Holt, Nodaway, Platte and Worth.

The central division of the western district comprises the counties of Benton, Boone, Calloway, Camden, Cole, Cooper, Hickory, Howard, Maries, Miller, Moniteau, Morgan, Osage, Pettis and Phelps.

The southern division of the western district comprises the counties of Christian, Cedar, Dade, Dallas, Douglas,

Greene, Howell, Laclede, Ozark, Polk, Pulaski, Taney, Texas, Webster and Wright.

The southwestern division of the western district comprises the counties of Barry, Barton, Jasper, Lawrence, McDonald, Newton, Stone and Vernon.

The time and place of holding district courts in the western district of Missouri are at Kansas City, fourth Monday in April and first Monday in November; at St. Joseph, first Monday in March and third Monday in September; at Springfield, first Mondays in April and October; at Jefferson City, third Mondays in March and October; Joplin, second Mondays in January and June.

MONTANA (ninth circuit) constitutes one judicial district.

The time and place of holding courts are the first Mondays in April and November, at Helena, the first Tuesdays in February and September, at Butte, and the first Mondays in May and October, at Great Falls.

NEBRASKA (eighth circuit) constitutes one judicial district.

The time and place of holding courts are at Omaha on the first Monday in May and the second Monday in November; Lincoln, third Monday in January and first Monday in October; Hastings, third Monday in April; Norfolk, fourth Monday in April.

NEVADA (ninth circuit) constitutes one judicial district.

The district court is held at Carson City on the first Mondays in February, May and October.

NEW HAMPSHIRE (first circuit) comprises the entire state.

The time and place of holding court are at Portsmouth on the third Tuesdays in March and September; Concord on the third Tuesdays in June and December; Littleton on the last Tuesday in August.

NEW JERSEY (third circuit) constitutes one judicial district.

The district court is held on the third Tuesdays in January, April, June and September, at Trenton.

New Mexico (eighth circuit) is divided into six judicial districts, called the first, second, third, fourth, fifth and sixth districts.

The counties in the first district are Santa Fe, Taos, Rio Arriba and San Juan.

The United States court for the first district is held at Santa Fe first Mondays in March and September.

The second district comprises the counties of Bernalillo, McKinley, Sandoval and Valencia.

The United States court for the second district is held at Albuquerque third Mondays in March and September.

The third district includes the counties of Donna Ana, Grant, Luna, Socorro and Sierra.

The United States court for the third district is held at Las Cruces first Mondays in April and October.

The fourth district comprises the counties of San Miguel, Mora, Colfax and Union.

The United States court for the fourth district is held at Las Vegas second Mondays in May and November.

The fifth district comprises the counties of Roosevelt, Chaves and Eddy.

The United States court for the fifth district is held at Roswell third Mondays in April and October.

The sixth district comprises the counties of Lincoln, Guadalupe, Otero, Quay and Torrance.

The United States court for the sixth district is held at Alamogordo, the fourth Mondays in May and November.

New York (second circuit) is divided into four districts, called the northern, the eastern, the western and the southern districts.

The northern district of New York comprises the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga,

Oswego, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren and Washington, with the waters thereof.

District courts for the northern district are held on the second Tuesday in February, at Albany; first Tuesday in December, at Utica; second Tuesday in June, at Binghamton; first Tuesday in October, at Auburn; first Tuesday in April, at Syracuse; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, St. Lawrence, Clinton, Jefferson, Oswego and Franklin as he may from time to time appoint.

The eastern district of New York includes the counties of Kings, Queens, Richmond, Nassau and Suffolk, with the waters thereof.

The time and place of holding district courts for the eastern district of New York are on the first Wednesday in every month, at Brooklyn.

The southern district of New York comprises the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester.

The district court for the southern district of New York is held on the first Tuesday in each month, at New York City.

The western district of New York comprises the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming and Yates, with the waters thereof.

The time and place of holding district court for the western district of New York are on the second Tuesday in January, at Elmira; second Tuesdays in March and November, at Buffalo; second Tuesday in May, at Rochester; second Tuesday in July, at Jamestown; second Tuesday in October, at Lockport.

North Carolina (fourth circuit) has two districts, called the eastern and western districts.

The eastern district of North Carolina includes the counties

of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Chatham, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Person, Perquimans, Pitt, Richmond, Robeson, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne and Wilson.

The time and place of holding courts are Raleigh, fourth Monday in May and first Monday in December; Wilmington, first Monday after the fourth Mondays in April and October; Newbern, fourth Mondays in April and October; Elizabeth City, third Mondays in April and October; Washington, second Mondays in April and October.

The western district comprises the counties of Alamance, Alexander, Alleghany, Anson, Ashe, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Clay, Cleveland, Davie, Davidson, Forsythe, Gaston, Graham, Guilford, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mecklenburg, Mitchell, Montgomery, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Watauga, Wilkes, Yadkin and Yancey.

The time and place of holding district courts are on the first Mondays in April and October, at Greensboro; third Mondays in April and October, at Statesville; first Mondays in May and November, at Asheville; first Mondays in June and December, at Charlotte; and fourth Mondays in May and November, at Wilkesboro.

North Dakota (eighth circuit) constitutes one judicial district.

The district is divided into five divisions, called the southwestern, southeastern, northeastern, northwestern and western divisions.

The southwestern division comprises the counties of Bur-

leigh, Emmons, Foster, Kidder, Logan, McIntosh, McLean, Stutsman and Wells, and all territory in the state lying west of the Missouri River and south of the twelfth standard parallel.

The southeastern division comprises the counties of Barnes, Cass, Dickey, Griggs Lamoure, Ransom, Richland, Sargent and Steele.

The northeastern division comprises the counties of Cavalier, Grand Forks, Nelson, Pembina, Traill and Walsh.

The northwestern division comprises the counties of Benson, Bottineau, Eddy, McHenry, Pierce, Ramsey, Rolette and Tower.

The western division comprises the counties of Ward and Williams and all the territory west of the Missouri River and north of the twelfth standard parallel.

The time and place of holding district courts are on the first Tuesday in July, at Devil's Lake; first Tuesday in March, at Bismarck; third Tuesday in May, at Fargo; second Tuesday in November, at Grand Forks; second Tuesday in October, at Minot.

Ohio (sixth circuit) is divided into two districts, the northern district and the southern district.

The northern district is divided into two divisions, called the eastern division of the northern district, and the western division of the northern district.

The eastern division of the northern district comprises the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull and Wayne.

The time and place of holding district courts are on the first Tuesdays in February, April and October, at Cleveland.

The western division of the northern district includes the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa,

Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood and Wyandot.

The district court for the western division of the northern district is held at Toledo on the first Tuesdays in June and December.

The southern district is divided into two divisions, called the eastern division of the southern district, and the western division of the southern district.

The eastern division of the southern district includes the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble Perry, Pickaway, Pike, Ross, Union, Vinton and Washington.

The district court for the eastern division of the southern district is held on the first Tuesdays in June and December, at Columbus.

The western division of the southern district includes the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby and Warren.

The time and place of holding district courts for the western division of the southern district are on the first Tuesdays in February, April and October, at Cincinnati.

Oklahoma (eighth circuit). The state (when admitted as a state, pursuant to act of June 16, 1906) shall constitute two judicial districts, to be known as the eastern district of Oklahoma, and the western district of Oklahoma.

The eastern district of Oklahoma comprises the Indian Territory.

The times and places of holding district courts in this district are at Muscogee, on the first Monday in January; at Vinita, on the first Monday in March; at Tulsa, on the first Monday in April; at South McAlester, on the first Monday in June; at Ardmore, on the first Monday in October, and at Chickasha,

on the first Monday in November. The clerk's office is at Muscogee.

The western district comprises Oklahoma Territory.

The times and places of holding district courts in this district are at Guthrie, on the first Monday in January; at Oklahoma City, on the first Monday in March; at Enid, on the first Monday in June, and at Lawton, on the first Monday in October. The clerk's office is at Guthrie.

OREGON (ninth circuit) constitutes one judicial district.

The district court is held at Portland on the first Mondays in March, July and November.[9]

PENNSYLVANIA (third district) is divided into three districts, the eastern, middle and western districts.

The eastern district comprises the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia and Schuylkill.

The district court is held on the second Mondays in March and June, third Monday in September, and second Monday in December at Philadelphia.

The middle district comprises the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming and York.

The times and places of holding district courts: Scranton, fourth Monday in February and third Monday in October; Harrisburg, first Monday in May and first Monday in December; Williamsport, second Monday in January and second Monday in June.

The western district comprises the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion,

[9] Act of April 28, 1904, provides: "That in case of the absence of the United States district judge for the district of Oregon from said district, or of his disability, a circuit judge of the United States of the circuit to which such district belongs may hold the district court and perform the duties of the district judge."

Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington and Westmoreland.

The time and place of holding district courts are at Pittsburg, first Monday in May and third Monday in October; at Erie, third Monday in July and second Monday in January.

Porto Rico constitutes one judicial district.

The district comprises the island of Porto Rico (seven electoral districts and seven local judicial districts).

The times and places of holding courts are at San Juan, April and October; at Ponce, January; at Mayaguez, special term immediate following January term at Ponce.

Rhode Island (first circuit) constitutes one judicial district.

The district court is held at Providence on the first Tuesdays in February and August; at Newport the second Tuesday in May and the third Tuesday in October.

South Carolina (fourth circuit) constitutes one judicial district.[10]

The district court is held on the first Tuesdays in June and December, at Charleston; third Tuesdays in April and October, at Greenville; fourth Tuesday in November, at Columbia; first Tuesday in March, at Florence.

South Dakota (eighth circuit) constitutes one judicial district, divided into four divisions, called the northern, central, southern and western divisions.

The northern division (court at Alberdeen) includes the counties of Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink, Brown, McPherson,

[10] There has been much confusion with reference to the meaning of R. S. Sec. 546, whether the State of South Carolina was divided into two districts or two divisions; but it is now settled that the state constitutes one district divided into two divisions. See 26 Stat. at L. 71; Barrett v. United States, 169 U. S. 218; Lucker v. Phœnix Co., 66 Fed. Rep. 161; Young v. Insurance Co., 29 Fed. Rep. 273.

Edmunds, Campbell, Walworth, and Sisseton and Wahpeton Indian reservations.

The central division (court at Pierre) comprises the counties of Buffalo, Faulk, Jerauld, Hand, Hughes, Hyde, Potter, Stanley, Sulley; also Cheyenne and part of Standing Rock Indian reservations.

The southern division (court at Sioux Falls) includes the counties of Aurora, Beadle, Bonhomme, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, Lyman, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, Yankton; also Crow Creek, Lower Brule and Yankton Indian reservations.

The western division (court at Deadwood) comprises the counties of Butte, Custer, Fall River, Lawrence, Meade, Pennington, and the Rosebud and Pine Ridge Indian reservations.

The time and place of holding district courts in South Dakota are at Sioux Falls, first Tuesday in April and third Tuesday in October; at Aberdeen, first Tuesday in May and second Tuesday in November; at Deadwood, third Tuesday in May and first Tuesday in September; at Pierre, second Tuesday in June and first Tuesday in October.

Tennessee (sixth circuit) is divided into three districts, the eastern, middle and western districts.

The eastern district of Tennessee is divided into three divisions called respectively the northern division of the eastern district, the southern division of the eastern district and the northeastern division of the eastern district.

The northern division of the eastern district of Tennessee comprises the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Scott, Sevier and Union.

The southern division of the eastern district of Tennessee comprises the counties of Bledsoe, Bradley, Cumberland, Fentress, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, Sequatchie.

The northeastern division of the eastern district of Tennessee comprises the counties of Carter, Cocke, Greene, Ham-

blen, Hancock, Hawkins, Johnson, Sullivan, Unicoi and Washington.

The time and place of holding district courts in the eastern district are first Monday in March and second Monday in September, at Knoxville; first Mondays in April and December, at Chattanooga; second Mondays in June and November, at Greenville.

The middle district comprises the counties of Bedford, Cannon, Cheatham, Clay, Coffee, Davidson, Dekalb, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Jackson, Lawrence, Lewis, Lincoln, Macon, Marshall, Maury, Montgomery, Moore, Overton, Pickett, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Van Buren, Warren, Wayne, White, Williamson and Wilson.

The time and place of holding district courts are at Nashville on the first Mondays in May and October.

The western district of Tennessee is divided into two divisions called respectively the eastern division of the western district and the western division of the western district.

The eastern division of the western district comprises the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardin, Hardeman, Henderson, Henry, Lake, Madison, McNairy, Obion, Weakley and Perry.

The western division of the western district comprises the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby and Tipton.

The time and place of holding district courts in the western district are at Jackson on the fourth Mondays in April and October; at Memphis on the fourth Mondays in May and November.

Texas (fifth circuit) is divided into four districts, the northern, eastern, western and southern districts.

The counties in the northern district are returnable to Dallas—Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro and Rockwall.

Returnable to Fort Worth—Archer, Armstrong, Bailey, Baylor, Briscoe, Carson, Castro, Childress, Clay, Cochran,

Collingsworth, Comanche, Cottle, Dallam, Dawson, Deaf Smith, Donley, Erath, Floyd, Foard, Gray, Hale, Hall, Hansford, Hardeman, Hartley, Hemphill, Hockley, Hood, Hutchinson, Jack, Lamb, Lipscomb, Moore, Motley, Ochiltree, Oldham, Palo Pinto, Parker, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Tarrant, Wheeler, Wichita, Wilbarger, Wise and Young.

Returnable to Abilene—Andrews, Borden, Callahan, Crosby, Dickens, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, King, Knox, Lubbock, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton and Yoakum.

Returnable to San Angelo—Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runnells, Schleicher, Sterling, Sutton, Tom Green and Upton.

The time and place of holding courts for the northern district are at Dallas, second Monday of January and the first Monday of May; at Forth Worth, second Monday of March and the first Monday of November; at Abilene, second Monday of April and the first Monday of October; at San Angelo, fourth Monday of April and the third Monday in October.

The counties in the eastern district are: Returnable to Paris—Delta, Fannin, Lamar and Red River.

Returnable to Texarkana—Bowie, Franklin and Titus. No definite time for holding court.

Returnable to Beaumont—Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine and Tyler.

Returnable to Tyler—Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Shelby, Smith, Van Zandt and Wood.

Returnable to Jefferson—Camp, Cass, Harrison, Hopkins, Marion, Morris and Upshur.

Returnable to Sherman—Collin, Cooke, Denton, Grayson and Montague.

The time and place of holding court for the eastern district are Tyler, fourth Mondays in January and April: Jefferson, first Monday in October and third Monday in February; Paris,

fourth Monday of October and second Monday of March; Beaumont, third Monday in November and first Monday in April; Sherman, first Monday in January and third Monday in May; Texarkana, twice a year, at times to be fixed by judges.

The counties in the western district are: Returnable to Austin—Bastrop, Blanco, Burleson, Burnett, Caldwell, Fayette, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, McCulloch, Mason, San Saba, Travis, Washington and Williamson.

Returnable to Waco—Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson and Somervell.

Returnable to San Antonio—Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, Maverick, Mendina, Pecos, Terrell, Uvalde, Valverde, Wilson and Zavalla.

Returnable to El Paso—Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Presidio, Reeves, Ward and Winkler.

The time and place for holding district courts are at Austin, fourth Monday in January and second Monday in June; at Waco, second Monday in November and fourth Monday in February; at San Antonio, third Monday in December and first Monday in May; at El Paso, first Monday in October and first Monday in April; at Del Rio, fourth Monday in October and third Monday in March, each year.

Counties in the southern district are: Returnable to Galveston—Austin, Brazoria, Chambers, Fort Bend, Galveston, Matagorda and Wharton.

Returnable to Houston—Brazos, Colorado, Grimes, Harris, Fayette, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker and Waller.

Returnable to Laredo—Duval, Lasalle, McMullen, Nueces, Webb and Zapata.

Returnable to Victoria—Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio and Victoria.

Returnable to Brownsville—Cameron, Hidalgo and Starr.

Times and places of holding district courts are at Galveston, second Monday in January and first Monday in June; at Houston, fourth Mondays in February and September; at Laredo, third Monday in April and second Monday in November; at Brownsville, second Monday in May and first Monday in December; at Victoria, fourth Monday in November and first Monday in May.

UTAH (eighth circuit) constitutes one judicial district.

The time and place of holding courts are on the second Mondays in April and November, at Salt Lake; second Mondays in March and September, at Ogden.

VERMONT (second circuit) constitutes one judicial district.

The time and place of holding district courts are the fourth Tuesday in February, at Burlington; the third Tuesday in May, at Windsor; the first Tuesday in October, at Rutland.

One of the stated terms of the district court may, when adjourned, be adjourned to meet at Newport.

VIRGINIA (fourth circuit) is divided into two districts, the eastern and western districts.

The counties in the eastern district are Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Lousia, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland and York.

The time and place of holding district courts for the eastern district are the first Mondays in April and October, at Richmond; the first Mondays in May and November, at

Norfolk; the first Mondays in January and July, in Alexandria.

Counties in the western district are Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetout, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise and Wythe.

The time and place of holding district courts for the western district are at Danville, Tuesdays after the second Mondays in April and November; Lynchburg, Tuesdays after the second Mondays in March and September; Abingdon, Tuesdays after the first Mondays in May and October; Harrisonburg, Tuesdays after the first Mondays in June and December; Charlottesville, second Monday in January and first Monday in July; Roanoke, second Monday in February and third Monday in June; at Bigstone Gap, fourth Monday in January and second Monday in August.

Washington (ninth circuit) constitutes two judicial districts, called the eastern and western districts.

The eastern district is divided into two divisions, called the eastern division of the eastern district and the southern division of the eastern district.

The eastern division of the eastern district comprises the counties of Adams, Spokane, Lincoln, Douglas, Kittitas, Chelan, Okanogan, Ferry and Stevens.

The time and place of holding district courts for the eastern division is at Spokane, first Tuesdays in April and September.

The southern division of the eastern district includes the counties of Wallawalla, Columbia, Garfield, Asotin, Whitman, Franklin, Yakima and Klickitat.

The district courts for the southern division are held at

Wallawalla, first Tuesdays in June and December; and at North Yakima, first Tuesdays in May and October.

The western district is divided into two divisions called the northern division of the western district and the western division of the western district.

The northern division of the western district comprises the counties of King, Kitsap, Island, Whatcom, Skagit, Jefferson, Clallam, San Juan and Snohomish.

The time and place of holding district courts for the northern division are at Seattle, first Tuesdays in May and November.

The western division of the western district embraces the counties of Pierce, Thurston, Mason, Chehalis, Lewis, Pacific, Wahkiakum, Cowlitz, Clarke and Skamania.

The district courts for the western division are held at Tacoma, first Tuesdays in February and July.

West Virginia (fourth circuit) is comprised of two districts, the northern and southern district.

The northern district is composed of the following counties: Barbour, Berkeley, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Wetzel, Wirt and Wood.

Times and places of holding courts: Wheeling, first Tuesday in April and third Tuesday in September; Clarksburg, third Tuesday in April and first Tuesday in October; Martinsburg, second Tuesday in May and third Tuesday in October.

The southern district is composed of the following counties: Boone, Braxton, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers, Wayne, Webster and Wyoming.

Time and place of holding court for the southern district: At Addison, first Monday in September; at Huntington, first Tuesday in April and first Tuesday after the third Monday in September; at Bluefield, first Tuesday in May and third

Tuesday in October; at Charleston, first Tuesday in June and third Tuesday in November; at Lewisburg, second Tuesday in February.

Wisconsin (seventh circuit) is divided into two districts, the eastern and western districts.

The counties in the eastern district are Brown, Calumet, Dodge, Door, Fond du Lac, Florence, Forest, Green Lake, Kenosha, Kewaunee, Langlade (except townships 31, 32, 33, and 34 of ranges 9 and 10 east), Marquette, Manitowoc, Milwaukee, Marinette, Oconto, Oneida (townships 35, 36, 37, 38 and 39 of range 11 east), Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Vilas (townships 40, 41 and 42 of range 11 east), Walworth, Washington, Waukesha, Waupaca, Waushara and Winnebago.

The time and place of holding district courts are on the first Mondays of January and October, at Milwaukee; second Tuesday of June at Oshkosh; first Tuesday in April at Green Bay.

The western district comprises the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, LaCrosse, Lafayete, Lincoln and that part of Langlade lying and being in townships 31, 32, 33 and 34, north of ranges 9 and 10, east of the fourth principal meridian; also Marathon, Monroe, Oneida (except townships 35, 36, 37, 38 and 39 of range 11 east), Pepin, Pierce, Polk, Portage, Richland, Rock, Rusk, St. Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas (except townships 40, 41 and 42 of range 11 east), Washburn and Wood.

The time and place of holding distirct courts of the western district are on the first Tuesday in December, at Madison; first Tuesday in June, at Eau Claire; third Tuesday in September, at La Crosse; and third Tuesday in June, at Superior. Special terms: At Madison, fourth Tuesday in June and first Tuesday in October. "The clerk residing at Madison shall attend all

terms of said courts at Eau Claire and Superior, as clerk thereof."

WYOMING (eighth circuit) constitutes one judicial district, which includes Yellowstone National Park.

The time and place of holding district courts are at Cheyenne, second Mondays in May and November; at Evanston, second Tuesday in July, and at Sheridan or in National Park at such dates as the courts may order.

APPELLATE COURTS—TERRITORIAL JURISDICTION.

THE SUPREME COURT.—The territorial jurisdiction of the Supreme Court of the United States includes all of the states and territories.

One term is held annually on the second Monday in October and such adjourned or special terms as it may find necessary for the dispatch of business.

CIRCUIT COURTS OF APPEALS.—The territorial jurisdiction and time of holding court of the several circuit courts of appeals is as follows:

The first circuit includes the states of Maine, New Hampshire, Massachusetts and Rhode Island.

Annual term, first Tuesday in October; stated sessions, first Tuesday in every month; sessions for hearing cases, first Tuesday in January and October, and second Tuesday in April, at Boston, Mass.

The second circuit includes Vermont, Connecticut and New York.

One term of the circuit court of appeals for the second circuit is held annually at New York, N. Y., on the third Tuesday of October and such adjourned sessions as the court may from time to time designate.

The third circuit includes the states of New Jersey, Pennsylvania and Delaware.

The circuit court of appeals for the third circuit holds two terms in a year at Philadelphia, Pa. The March term com-

mences on the first Tuesday in March and the October term on the first Tuesday of October in each year.

The fourth circuit includes the states of North Carolina, South Carolina, Maryland, Virginia and West Virginia.

The circuit court of appeals for the fourth circuit holds three terms annually at Richmond, Va., beginning on the first Tuesday in February, May and November respectively.

The fifth circuit includes the states of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.

The circuit court of appeals for the fifth circuit holds a term of court at Montgomery, Ala., on the third Monday in October; at Atlanta, Ga., on the first Monday in October; at Fort Worth, Tex., on the first Monday in November, and at New Orleans, La., on the third Monday in November.

The sixth circuit includes the states of Ohio, Michigan, Kentucky and Tennessee.

The circuit court of appeals for the sixth circuit holds one term annually at Cincinnati, Ohio, beginning on the first Tuesday after the first Monday in October and adjourned sessions on the first Tuesday after the first Monday in each month except August and September.

The seventh circuit includes the states of Indiana, Illinois and Wisconsin.

The circuit court of appeals for the seventh circuit holds one term annually at Chicago, Ill., beginning on the first Tuesday in October. Term is divided into three sessions, beginning on the first Tuesdays in October and January, and second Tuesday in April.

The eighth circuit includes the states of Minnesota, Iowa, Missouri, Arkansas, Nebraska, Colorado, Kansas, Wyoming, North Dakota, South Dakota, Utah, Oklahoma and the territory of New Mexico.

The circuit court of appeals for the eighth circuit holds one term annually at St. Paul, Minn., beginning on the first Monday in May; one term annually at Denver, Colo., beginning the first Monday in September, and one term annually at St. Louis, Mo., beginning the first Monday in December.

The ninth circuit includes the states of California, Oregon, Nevada, Washington, Idaho and Montana, also includes the territories of Alaska, Arizona and Hawaii.

The circuit court of appeals for the ninth circuit holds the October term at San Francisco, beginning on the first Monday in October. Adjourned sessions on first Monday in each month; calendar sessions for hearing of causes commence on first Monday in October, February and May, respectively. An annual term at Seattle, Wash., beginning on the second Monday in September, for hearing of causes. An annual term in Portland, Ore., beginning on the third Monday in September, for hearing of causes.

CHAPTER IV.

THE JURISDICTION OF COURTS OF BANKRUPTCY.

§16. The statutory jurisdiction.

The jurisdiction of a court of bankruptcy is purely statutory. Congress has conferred power upon the courts of bankruptcy in the present act as follows:

"SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

"(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

"(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

"(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

"(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

"(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;

"(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

"(9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

"(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

"(11) determine all claims of bankrupts to their exemptions;

"(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

"(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

"(14) extradite bankrupts from their respective districts to other districts;

"(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;

"(16) punish persons for contempts committed before referees;

"(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

"(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

"(19) transfer cases to other courts of bankruptcy.

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

§ 16a. The general extent of the jurisdiction of courts of bankruptcy.

A court of bankruptcy, being created by Congress, depends solely for its jurisdiction and powers upon the laws of the United States.[1] It has no powers except those which are expressly granted by Congress, and such implied powers as must be necessary to give full force and effect to the jurisdiction conferred upon it.[2]

The jurisdiction conferred on the courts of bankruptcy by the bankrupt act includes two distinct classes of proceedings; namely, *first,* proceedings in bankruptcy proper[3] and,

[1] *In re* Williams, 120 Fed. Rep. 38. Consult *In re* Morris No. 9825, Fed. Cas., s. c. Crabbe, 70; Campbell's Case, No. 2349, Fed. Cas., 1 N. B. R. 165; Clark v. Binninger, 38 Howard's Prac. 341.

In re Morris, *supra,* Judge Hopkinson, in an exhaustive opinion, reached the conclusion that neither a Chancellor in England nor a United States judge, had any powers in bankruptcy matters, other than those arising expressly or impliedly from the bankrupt statute.

[2] Brumby v. Jones (C. C. A. 5th Cir.), 141 Fed. Rep. 318, 15 Am. B. R. 578; Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Havens & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569; Real Estate Trust Co. v. Thompson, 112 Fed. Rep. 945, 7 Am. B. R. 520; Henrie v. Henderson (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 15 Am. B. R. 760.

[3] Sec. 17 *post.* First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Holden v. Stratton, 191 U. S. 115,

second, controversies at law and in equity arising out of proceedings in bankruptcy.[4] It is important to observe the distinction between these two classes, because the procedure in the trial court as well as in the appellate court is governed by different rules. The jurisdiction of a court of bankruptcy over the former class of proceedings is exclusive of all other courts and extends to all matters, acts and things to be done under and in virtue of bankruptcy.[5] The jurisdiction of a court of bankruptcy over the second class of proceedings is concurrent with state and federal courts, which may have jurisdiction of the parties and controversy.[6]

Bankruptcy proceedings proper include the questions between the bankrupt and his creditors as such, commencing with the petition for adjudication and ending with the administration of the estate, the discharge or refusal to discharge the bankrupt and all matters of administration generally, such as the appointment of a receiver or trustee, sales, exemptions, allowances, dividends and the like, to be disposed of summarily, all of which naturally occur in the settlement of estates. What constitutes proceedings in bankruptcy is considered more fully in another place.[7]

By controversies at law and in equity arising in bankruptcy proceedings is meant those independent or plenary suits which concern bankrupts' estates and which arise by intervention or otherwise between the trustee, representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors. What constitutes

48 L. Ed. 116, 10 Am. B. R. 786; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256.

[4] Secs. 20 and 302*a* *post*. Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York. Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 733; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74; Doroshow v. Ott (C. C. A. 3rd Cir.), 134 Fed. Rep. 740, 14 Am. B. R. 34; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180.

[5] Sec. Secs. 17 and 18 *post*.

[6] See Sec. 20 *post*.

[7] Sec. 17 *post*.

controversies arising at law and in equity in a proceeding in bankruptcy is considered more fully hereafter.[8]

The jurisdiction at law and in equity conferred on the courts of bankruptcy by the bankrupt act is limited to controversies arising out of the settlement of the estates of bankrupts. They are not vested with general equity jurisdiction.[9]

Where property is in the possession of the trustee or receiver as a part of the bankrupt's estate, a court of bankruptcy has jurisdiction to settle all controversies and claims relating to such property. This is not because of any express provision of the bankruptcy act, but an application of the general principle of law that the possession of the *res* draws to the court jurisdiction of all questions in respect to title or liens irrespective of citizenship.[10] This principle is recognized in the bankrupt act and has frequently been applied by the courts of bankruptcy.[11] After reviewing the cases on the subject of

[8] Consult Sec. 20 *post*, plenary suits at law and in equity; Sec 203, Suits to set aside fraudulent conveyances and preferences; Sec. 152, Reclamation proceedings; Sec. 302*a*, What constitutes controversies arising in bankruptcy proceedings.

[9] Brumby v. Jones (C. C. A. 5th Cir.), 141 Fed. Rep. 318, 15 Am. B. R. 578; Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Havens & Geddes Co. v. Pierek (C. C. A. 7th. Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569; Real Estate Trust Co. v. Thompson, 112 Fed. Rep. 945, 7 Am. B. R. 520; Henrie v. Henderson (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 15 Am. B. R. 760.

[10] Morgan's Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 34 L. Ed. 625; Krippendorf v. Hyde, 110 U. S. 276, 28 L. Ed. 145; Toledo, etc., Ry. Co. v. Continental Trust Co. (C. C. A. 6th Cir.), 95 Fed. Rep. 497, 36 C. C. A. 195.

[11] B. A. 1898, Sec. 2. Whitney v. Wenman, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. 45; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. 633; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. R. 198; *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359; *In re* Kellogg (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; *In re* Haddin-Rodee Co., 135 Fed. Rep. 886, 13 Am. B. R. 604; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R.

the jurisdiction of a court of bankruptcy, Mr. Justice Day, speaking for the supreme court, said:[12] "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankruptcy act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of the liens thereon or rights therein."

Whether propounding a claim against property in the possession of a trustee by a stranger constitutes a controversy at law or in equity, or is a proceeding in bankruptcy, is not always clear. This is well illustrated by two cases in the supreme court. In *Hewit* v. *Berlin Mach. Wks.*,[13] the supreme court held that where a stranger asserts title to property in the possession of the trustee by an intervention raising

608; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re Emslie* (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992.

In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316, the court said:

"The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 34 L. Ed. 625), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654, the court said:

"The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

[12] Whitney v. Wenman, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. B. R. 45.

[13] 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

a distinct and separable issue, the controversy may be treated as a controversy arising in bankruptcy proceedings and not a proceeding in bankruptcy proper. In *First Nat. Bank* v. *Title & Trust Co.*,[14] the same kind of an issue arose, but it arose upon the application of a trustee for an order of sale and as an incident to that, the determination of a claim against the property held by one not a party to the proceeding, who had been cited to come in and propound his claim. This was held to be a proceeding in bankruptcy. Where the property is in *custodia legis* and an adverse claimant is required to propound his claim against the property as an incident to a step in the bankruptcy proceedings proper, the proceeding continues to be in bankruptcy as distinguished from a controversy at law or in equity.[15] The jurisdiction of a court of bankruptcy extends to both classes of proceedings when the property is in *custodia legis*, but the method of reviewing a decision of that court in the appellate courts is not the same.[16]

This jurisdiction may be exercised in a summary proceeding or resort may be had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of the equitable procedure.[17] A trustee may sell property in his possession and require adverse claimants to come in and set up their claim of interest or title in the property.[18] This is a proceeding in bankruptcy. The adverse claimant may assert his title to or interest in the prop-

[14] 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

[15] *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; *In re* New England Piano Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Knopf, 144 Fed Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Moody, 131 Fed. Rep. 525, 12 Am. B. R. 718, s. c. 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608.

[16] Sec. 301*a post*.

[17] Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——.

[18] *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R.——; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404.

erty in possession of the trustee by an intervention raising a distinct and separable issue.[19] This may be a controversy arising in bankruptcy. In either case the jurisdiction of the court of bankruptcy depends upon the fact that the property in controversy is in the custody of that court.

Where property claimed as a part of the bankrupt's estate is in the possession of a person other than the bankrupt at the time the petition in bankruptcy is filed, it may be within the power of a court of bankruptcy to deal with it, but not in every instance, as will be pointed out presently.

A court of bankruptcy has power, by means of its receiver or marshal, to summarily take property from the possession of an adverse claimant as well as the bankrupt or his agent in case it finds it necessary for the preservation of the estate.[20] This is a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy and is not limited by Section 23, which relates only to suits by a trustee.[20]

Where property is held for the bankrupt by a bailee or agent, who does not claim title to or an interest in the property, the court of bankruptcy may, in a summary proceeding, order him to deliver such property to the trustee.[21] An assignee for the benefit of creditors does not hold his title for value but is simply an agent for the distribution of the proceeds of the debtor's property among his creditors and may be required by summary order to transfer to the trustee in bankruptcy all the property which comes into his hands under the

[19] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[20] B. A. 1898, Sec. 2, clause 3. Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Moody, 131 Fed. Rep. 525, 12 Am. B. R. 718, s. c. 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

[21] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Feldser, 134 Fed. Rep. 307, 14 Am. B. R. 216; *In re* Moore, 104 Fed. Rep. 896, 5 Am. B. R. 151; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

assignment.[22] A court of bankruptcy has no power in a summary proceeding to compel a third person claiming title to or an interest in property in his possession to transfer it to the trustee.[23] The trustee can not sell such property under the direction of the court, requiring the claimant to assert his interest in the property and have it determined by the court of bankruptcy.[24] A secured creditor or other claimant may bring the property in controversy into the court of bankruptcy and submit to its jurisdiction. In such case the trustee has power to sell the property, preserving the rights of the adverse claimant in the fund resulting from the sale. But a court can not by a summary proceeding compel an adverse claimant, having possession of the property, to yield possession to the trustee.

In a summary proceeding by a trustee to recover property in the possession of an adverse claimant the court of bankruptcy may enter upon an inquiry as to whether the claim is real or merely colorable. If real, it must decline to finally adjudicate on the merits in a summary proceeding.[25] Should it appear that the claim is fictitious or colorable, the court may retain jurisdiction on the theory that the property is

[22] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Leidigh Carriage Co. v. Stengel 523; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Smith, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re* Thompson (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 11 Am. B. R. 719, affirming 122 Fed. Rep. 174, 10 Am. B. R. 242.

[23] See Sec. 20 *post*. Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re* New York Car Wheel Works, 132 Fed. Rep. 203, 13 Am. B. R. 60; *In re* Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367.

[24] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

[25] Schweer v. Brown, 195 U. S. 171, 12 Am. B. R. 673; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 244; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B R. 421; *In re* La Plume Condensed Milk Co., 145 Fed. Rep. 1013, 15 Am. B. R. 413.

then constructively in the possession of the court.[26] The summary jurisdiction of a court of bankruptcy, invoked by a trustee to recover property in the possession of a person other than the bankrupt, is limited to such property as is held by the bankrupt or for him by a bailee or agent, who does not in good faith claim title to or interest in the property.

Where property is in the possession of a third person claiming title to or interest in it, the trustee must bring a plenary suit at law or in equity to recover such property or the value of the bankrupt's interest in it.[27] The original bankrupt act conferred jurisdiction on the courts of bankruptcy of suits at law and in equity to collect debts, recover property on the ground of a voidable preference or a fraudulent transfer within four months under Section 67*e*, or to set aside a fraudulent conveyance under Section 70*e* only "with the consent of the defendant."[28] By the amendment of February 5, 1903,[29] the jurisdiction was extended to suits for the recovery of property, which is claimed to be a voidable preference under Section 60*b* or a fraudulent transfer under Section 67*e*, without the consent of the defendant.[30] At present suits by the trustee to collect debts owing the bankrupt or to set aside fraudulent conveyances under Section 70*e*, can be maintained only with the consent of the defendant.[31] Suits of this character are controversies arising in bankruptcy as distinguished from proceedings in bankruptcy.

[26] *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Michie, 116 Fed. Rep. 749, 8 Am. B. R. 734; *In re* Kane, 131 Fed. Rep. 386, 12 Am. B. R. 444; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

[27] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525.

[28] See Sec. 20 *post*. Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182, 4 Am. B. R. 177; Hicks v. Knost, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178.

[29] See Secs. 23*b*, 60*b* and 67*e* as amended Feb. 5, 1903, 32 Stat. at L. 797.

[30] See Sec. 203 *post*. B. A. 1898, Sec. 23*b*, as amended by the Act of Feb. 5, 1903, 32 Stat. at L. 797.

[31] See Sec. 203 *post*. Gregory v. Atkinson, 127 Fed. Rep. 183, 11 Am. B. R. 495.

The district courts have jurisdiction of suits on trustees' bonds.[32]

The district courts as courts of bankruptcy are invested with "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings" in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy courts act under specific statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law.[33]

The jurisdiction of the courts of bankruptcy of certain proceedings is the subject of a separate section or is considered in connection with the subjects to which they relate, such as jurisdiction of bankruptcy proceedings proper,[34] jurisdiction of suits at law and in equity,[35] the power to stay suits,[36] the power of appointing receivers,[37] the power to review orders made by a referee,[38] jurisdiction over exempt property,[39] jurisdiction to entertain auxiliary proceedings in aid of the main proceeding in another district,[40] and the jurisdiction of the appellate courts to review and revise the decisions of courts of bankruptcy.[41]

§ 17. Jurisdiction of bankruptcy proceedings proper.

The jurisdiction of the courts of bankruptcy over proceedings in bankruptcy is plenary and exclusive. It extends to all matters, acts and things to be done under and in virtue of bankruptcy. Section 2 enumerates certain specific powers and

[32] U. S. v. Union Surety & Guarantee Co., 118 Fed. Rep. 482, 9 Am. B. R. 114.

[33] Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50. See also R. S., Sec. 566.

[34] Sec. 17 *post.*

[35] Secs 20 and 203 *post.*

[36] Sec. 22 *post.*

[37] Sec. 77*a post.*

[38] Sec. 32*a post.*

[39] Sec. 180 *post.*

[40] Sec. 21 *post.*

[41] Sec. 301*a.*

concludes, "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any powers it would possess were certain specific powers not herein enumerated."

Proceedings in bankruptcy are instituted by the filing of the petition.[1] The filing of the petition "is a *caveat* to all the world and in effect an attachment and injunction,"[2] and on adjudication title to the bankrupt's property becomes vested in the trustee with actual or constructive possession, and is in the custody of the bankruptcy court.[2] The proceedings end in the distribution of the assets among the creditors and the discharge or refusal to discharge the bankrupt.

The jurisdiction of a court of bankruptcy includes the power to make or refuse an adjudication in bankruptcy,[3] and to administer the estate of the debtor and to grant or refuse to grant him a discharge. By estate is meant the property in the possession of the debtor at the time proceedings in bankruptcy are commenced to which the trustee may fairly make a pretension of claim.[4] In the exercise of its summary jurisdiction a court of bankruptcy may order the bankrupt or his agent to pay over to the trustee such property as he has in his possession and punish him for contempt of court if he disobeys,[5] or compel restitution by persons who have forcibly

[1] *In re* Kindt, 98 Fed. Rep. 867, 3 Am. B. R. 546.

[2] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Weinger-Bergman Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 613; *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23.

As to the meaning of the word "attachment," see York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[3] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[4] *In re* New England Piano Co., 122 Fed. Rep. 937, 9 Am. B. R. 767; White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178, 44 L. Ed. 1183, 4 Am. B. R. 178.

[5] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; 5 Am. B. R. 176; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

An assignee for creditors is an agent of the debtor. Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re* Stokes,

or unlawfully seized and taken out of the custody of the court property which had lawfully come into its possession as a part of the bankrupt's property,[6] or determine claims against the bankrupt's property in the possession of the court,[7] or determine validity and the relative priority of conflicting claims to a fund arising from the sale of property,[8] or determine whether particular property in question is a part of the bankrupt's estate and subject to distribution to his creditors,[9] or to order paid to the trustee money in the hands of a sheriff acquired by levy and sale within four months prior to the filing of the petition in bankruptcy,[10] but not when the money has been paid over to the judgment creditor,[11] or to order paid to the trustee property in the hands of a bailee or agent who does not claim title to such property,[12] or to enjoin the

106 Fed. Rep. 312, 6 Am. B. R. 262.

The court has no power to order a bankrupt to pay over money, which is not under his control. American Trust Co. v. Wallis (C. C. A. 3d Cir.), 126 Fed. Rep. 464, 11 Am. B. R. 360.

[6] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Briskman, 132 Fed. Rep. 201, 13 Am. B. R. 57.

[7] Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623, affirmed 121 Fed. Rep. 333.

[8] *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re* McCallum, 113 Fed. Rep. 393, 7 Am. B. R 596; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608.

[9] *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623; Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359.

[10] Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555; 9 Am. B. R. 476, affirming *In re* Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355; *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re* Vastbinder, 132 Fed. Rep. 718, 13 Am. B. R. 148.

[11] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381.

See observation of Mr. Justice Brewer in Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

But see *In re* Breslauer, 121 Fed. Rep. 910, 10 Am. B. R. 33.

[12] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; 5 Am. B. R. 176; *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151; *In re* Stokes, 106 Fed. Rep. 312,

prosecution of suits founded upon provable debts or to prevent the transfer or disposition of the debtor's property or any interference with the administration of the debtor's estate,[13] or to order an assessment upon the stockholders of a bankrupt corporation for unpaid subscriptions,[14] or to order a trustee to pay over to the owner money or property which has come into his possession by virtue of his office,[15] or to appoint trustees when the creditors fail to elect, or to punish for failure to obey lawful orders and punish for contempts committed before referees.

The court of bankruptcy is given authority to "appoint receivers or the marshals, upon application of parties in interest, in case the court will find it absolutely necessary for the preservation of the estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."[16] This includes property of the bankrupt in the hands of a third person and is a proceeding in bankruptcy which is not affected by Section 23, which relates only to suits by a trustee.[17] In case property is taken by summary proceeding opportunity must be given the claimant to propound his claim to the property.[18]

6 Am. B. R. 262; *In re* Feldser, 134 Fed. Rep. 307, 14 Am. B. R. 216.

[13] Sec. 22 *post*. *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689.

[14] *In re* Miller Electric Maintenance Co., 111 Fed. Rep. 515, 6 Am. B. R. 701.

[15] *In re* Howard (C. C. A. 9th Cir.), 135 Fed. Rep. 721, affirming 130 Fed. Rep. 1004, 12 Am. B. R. 462.

[16] B. A. 1898, Sec. 2, clause 3. Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; *In re* Florcken, 107 Fed. Rep. 241, 5 Am. B. R. 802.

[17] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Moody, 131 Fed. Rep. 525, 12 Am. B. R. 718; s. c. Fed. Rep. 628, 14 Am. B. R. 472; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

[18] *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14. As was done *In re* Knopf 144, Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Moody, 131 Fed. Rep. 525, 12 Am B. R. 718, s. c. 134 Fed. Rep. 628 14 Am. B. R. 472.

A sale of property by a trustee under the direction of the court, requiring adverse claimants to come in and set up their claim is a proceeding in bankruptcy.[19] The court of bankruptcy has jurisdiction of such a proceeding when the property sold is in *custodia legis*,[20] and not otherwise.[21] The fact that the court acquires a fund arising from such sale does not give it jurisdiction to dispose of it unless it had jurisdiction of the property sold.[22] Where the adverse claimant intervenes in a bankruptcy proceeding to assert his claim against the property in the possession of the trustee and thereby raises a distinct and separable issue, it is treated as a controversy arising in bankruptcy.[23]

In administering an estate it is the duty of a court of bankruptcy to determine the proportionate share of each creditor, declare dividends, order payment and close the estate,[24] and in proper cases to reopen it for further proceedings.[25]

The object and policy of the bankrupt law is that proceedings under it shall be summary in order to settle the bankrupt's affairs as speedily and with as little delay as may be consistent with justice. The proceedings in bankruptcy generally are in the nature of proceedings in equity.[26] The

[19] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* New England Piano Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

[20] *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* New England Piano Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

[21] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

[22] First Nat. Bank v. Title & Trust Co., 198 U. S. 280.

[23] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180.

[24] *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

[25] *In re* Shaffer, 104 Fed. Rep. 982, 4 Am. B. R. 728; *In re* Newton, 107 Fed. Rep. 429, 6 Am. B. R. 52. See Sec. 271*a*, *post*.

[26] Bardes v. Hawarden Bank, 178 U. S. 524, 535, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182,

summary jurisdiction of a court of bankruptcy is regularly invoked by petition, upon filing which is issued a rule to show cause why the prayer of the petition should not be granted. In the exercise of the summary jurisdiction notice is required to be served upon the persons to be affected by the order of the court and reasonable time allowed within which to make a defense.[27] But resort may be had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.[28]

The summary jurisdiction of a court of bankruptcy may be exercised only with reference to those persons who are parties to the proceedings, and such as may be brought in and made parties under Sec. 2, clause 6, of the act. Such are the bankrupt, the petitioning creditors and such other claimants as may be properly brought in or who voluntarily appear and become parties.[29] It has been held that petitioning creditors, by nam-

10 Am. B. R. 608; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

[27] Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291; Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[28] Whitney v. Wenman, 198 U. S. 539, 553, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——.

[29] In Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654, the court said: "So far as Ida C. Fisher is concerned, there can be no question of jurisdiction, inasmuch as the proceedings have taken place in the case in which she was adjudged bankrupt, and the court therefore clearly had the power to proceed summarily for the purpose of merely compelling her to give her signature on the transfer of the license. So far as Rollin B. Fisher is concerned, it is maintained that he was entitled to appropriate the license, or an interest in it, to his court could not in the case of Ida personal use, and that therefore the C. Fisher in bankruptcy, proceed summarily against him with reference thereto. This objection is met, however, by the fact that Rollin B. Fisher is himself in bankruptcy, and his assignee submitted himself to the proceedings in the district court, which disposes of all substantial questions so far as Rollin B. Fisher is concerned."

In White v. Schloerb, 178 U. S. 542, 4 Am. B. R. 178 the supreme court said: "Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court

ing an assignee in a state proceeding as a party to the petition for an adjudication and praying a subpœna for him, can not thereby bring him into the case for the purpose of future inquiries and determinations to be made in the progress of the case.[30] It seems, however, that an assignee, not holding title adversely to the trustee, may be compelled by order of the bankruptcy court to deliver the property of the bankrupt in his possession to the trustee in bankruptcy.[31] Persons who claim property in their possession adversely to the trustee and who are not parties and who have not voluntarily appeared for the purpose of becoming parties can not be compelled to come into court under a rule to show cause or other summary process.[32]

When an application is made to the court to make a summary order directing a respondent to surrender the possession of certain property that is alleged by a trustee to belong to the bankrupt's estate, the court may examine the ground set up

property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: 'The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.'"

See also First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; and Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45.

[30] *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, s. c. 5 Am. B. R. 537; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 721.

[31] *In re* Thompson, 122 Fed. Rep. 174, 10 Am. B. R. 242, affirmed (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 11 Am. B. R. 719; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Smith, 92 Fed. Rep. 135, 2 Am. B. R. 9.

[32] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re* Ward, 104 Fed. Rep. 985, s. c. 5 Am. B. R. 215; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; *In re* N. Y. Carwheel Works, 132 Fed. Rep. 203, 13 Am. B. R. 60; *In re* Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367.

by the respondent for his refusal to deliver possession, and to determine whether a real, and not merely a pretended, controversy exists upon this subject.[33] If real, it must decline to finally adjudicate on the merits.[34] Should it appear that the claim is fictitious or colorable the court of bankruptcy may retain jurisdiction on the theory that the property is then constructively in the possession of the court of bankruptcy.[35]

§ 18. Bankruptcy jurisdiction exclusive.

The original jurisdiction in bankruptcy, conferred on these courts, is exclusive of the courts of the several states,[1] and also of the courts of the United States, not created courts of bankruptcy. The circuit courts have no bankruptcy jurisdiction under the act of 1898.[2]

The exclusive jurisdiction, however, is confined to matters in bankruptcy, and does not extend to matters at law or in equity which may grow out of bankruptcy proceedings.[3] This principle is recognized in section 23 of the act of 1898, which provides for instituting such suits in the circuit courts

[33] *In re* Baird, 8 Am. 649; Mueller v. Nugent, 184 U. S. 1, 15, 5 Am. B. R. 176; *In re* Teschmacher and Mrazay, 127 Fed. Rep. 728, 11 Am. B. R. 547; *In re* Kane, 131 Fed. Rep. 386, 12 Am. B. R. 444.

[34] Schweer v. Brown, 195 U. S. 171; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co., 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[35] *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Michie, 116 Fed. Rep. 749, 8 Am. B. R. 734; *In re* Kane, 131 Fed. Rep. 386, 12 Am. B. R. 444; *In re* Muncie Pulp Co. (C. C. A., 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

[1] R. S. Sec. 711; *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; Akins v. Stradley, 51 Ia. 414; Broach v. Powell, 79 Ga. 79; Southern v. Fisher, 6 S. C. 345.

[2] B. A. 1898, Sec. 23, where jurisdiction at law and in equity, as distinguished from proceedings in bankruptcy, is conferred upon the circuit courts, and in no place in the act is any bankruptcy jurisdiction conferred upon the circuit courts. As to when bankruptcy proceedings may be had in a circuit court, owing to the district judge being disqualified to act, see Sec. 24, *post*.

[3] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Small v. Muller (N. Y. Sup. Ct. App. Div.), 8 Am. B. R. 448; Reed v. Equitable Trust, 115 Ga. 780, 8 Am. B. R. 242.

of the United States and in the state courts. The former acts did not expressly confer or recognize any jurisdiction in the state courts, but the federal and state judges held that R. S. Sec. 711 did not divest the state courts of any jurisdiction at law or in equity.[4]

When jurisdiction in bankruptcy attaches, which it does as soon as the petition is filed,[5] it extends over the bankrupt and his estate. It extends to all the property of the bankrupt situate within the United States whether within or without the territorial jurisdiction of the court of bankruptcy.[6] The filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction.[7]

The trustee is vested with the title of the bankrupt's property as of the date when he is adjudged a bankrupt, and it is then in the legal custody of the court.[8] Property thus surrendered to a trustee can not be affected by any other court attempting to interfere with or withdraw the property from

[4] Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Burbank v. Bigelow, 92 U. S. 179; 23 L. Ed. 542; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Clark v. Ewing, 3 Fed. Rep. 83; Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729; *In re* Miller, No. 9551, Fed. Cas., s. c. 6 Biss. 30; Cook v. Whipple, 55 N. Y. 150.

[5] B. A. 1898, Sec. 1, clause 10; *In re* Kindt, 98 Fed. Rep. 867, 3 Am. B. R. 546; White v. Schloerb, 178 U. S. 542; 44 L. Ed. 1183, 4 Am. B. R. 178.

In re Weinger, Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424.

[6] *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232.

But see *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 352.

[7] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Reynolds, 127 Fed. Rep. 760, 11 Am. B. R. 758.

See observation of Mr. Justice Peckham in York Mfg. Co. v. Cassell, 201 U. S. 344, 353, 50 L. Ed. 782, 15 Am. B. R. 633, with reference to this phrase.

[8] *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re* Vastbinder, 132 Fed. Rep. 718, 13 Am. B. R. 148; *In re* Reynolds, 127 Fed. Rep. 760, 11 Am. B. R. 758.

See also Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

the possession of the trustee.[9] All claims against the bankrupt's property and all controversies concerning the same, including title to the property, which was in his possession at the time of filing the petition, should be presented and adjudicated in the court of bankruptcy.[10] Where the bankruptcy court in the exercise of its customary jurisdiction obtains the lawful custody of property to which liens attach, it has jurisdiction to determine the relative priorities of conflicting claims to the fund realied from the sale of the property.[11]

All suits against the bankrupt, founded upon a claim from which a discharge would be a release, and pending at the time of the filing of a petition against him, may be stayed until after an adjudication or dismissal of the petition; if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication; or if within that time such person applies for a discharge, then until the question of such discharge is deter-

[9] White v. Schloerb, 178 U. S. 545, 44 L. Ed. 1183, 4 Am. B. R. 178.

A referee or a trustee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshals and receivers are applicable with equal force to the protection of a trustee. Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660; Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815.

[10] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178, 2 N. B. N. 721; Whitney v. Wenman, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. B. R. 45; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers Calder Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Corbett, 5 Am. B. R. 224, 104 Fed. Rep. 872; *In re* Whitener (C. C. A., 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992.

[11] Chauncey v. Dyke Bros. (C. C. A., 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re* McMahon (C. C. A., 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——.

In Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; the supreme court held that when property was in the custody of the court "jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

mined.[12] The court may, however, direct the trustee to prosecute or defend a pending suit.

The filing of a petition in bankruptcy does not *propria vigore* abate or suspend a suit pending in a state court at the time.[13] Although the bankrupt court has exclusive jurisdiction of all proceedings in bankruptcy, it does not, upon such proceedings being instituted, draw to it all manner of controversies with the bankrupt.[14] State courts are entitled to notice of some kind before they are required to yield jurisdiction over a pending case.[15] Some cases may proceed to final settlement in the state court; others must be stayed if application is made for that purpose.[16] Where a state court loses its jurisdiction of the *res* by reason of a lien being annulled by the bankruptcy of the defendant the court of bankruptcy may acquire jurisdiction of it.[17]

[12] B. A. 1898, Sec. 11. See Sec. 22, *post*.

[13] Taylor v. Taylor (N. J. Chan.), 45 Atlantic Rep. 440, 4 Am. B. R. 211; Continental Nat. Bank v. Katz (Sup. Ct. Cook Co., Ill.), 1 Am. B. R. 19; Reid, Murdock & Co. v. Cross (Sup. Ct. Cook Co., Ill.), 1 Am. B. R. 34; Heath v. Shaffer, 93 Fed. Rep. 647; 2 Am. B. R. 98; *In re* Gerdes, 102 Fed Rep. 318, 4 Am. B. R. 346; *In re* Horton (C. C. A. 8th Cir.), 102 Fed. Rep. 986, 4 Am. B. R. 486; *In re* Scholtz, 106 Fed. Rep. 834; Reed v. Equitable Trust, 115 Ga. 780, 8 Am. B. R. 242.

In Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 5 Am. B. R. 644, the court said: "The institution of the proceedings in bankruptcy did not divest that [the state] court of its jurisdiction over appellant and his property; and it was clearly not only the right, but the duty, of that court to proceed to final decree in said cause, even if it was advised of the fact that the district court of the United States for the district of West Virginia had adjudicated one of the defendants thereto to be a bankrupt." Affirmed 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

[14] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re* Wells, 8 Am. B. R. 75, 114 Fed. Rep. 222; *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815; Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107.

[15] *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1.

[16] See Sec. 22, *post*.

[17] First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re* Vastbinder, 132 Fed. Rep. 718, 13 Am. B. R. 148.

Where the subject of a suit relates to matter subsequent to the commencement of bankruptcy proceedings, or to property not properly a part of the bankrupt's estate, the suit is not affected by the bankruptcy proceedings. Thus a debt created after the institution of bankruptcy proceedings may be collected out of property subsequently acquired by the bankrupt. Upon the same principle it would seem that a security on a homestead may be enforced in a state court pending the bankruptcy.

§ 19. Limitations to the exercise of jurisdiction.

Although full power and authority is conferred upon courts of bankruptcy, extending to all matters of bankruptcy without limitation, there are two principal restrictions to the exercise of this authority:

First. The power conferred extends only to persons, corporations, partnerships, etc., who are subject to be adjudged bankrupts. These courts have no authority over persons other than those specified in the act to be subject to its provisions.

Second. The courts of bankruptcy are expressly limited to the exercise of bankruptcy jurisdiction within their "respective territorial limits."

The language of this act in this respect is similar to the act of 1867, where the jurisdiction of courts of bankruptcy was limited to "their respective districts." With reference to the meaning of this expression in the act of 1867, Mr. Justice Bradley, in Lathrop *v.* Drake,[1] said: "When the act says that they shall have jurisdiction in their respective districts it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation."

A district court, sitting as a court of bankruptcy, has no greater power or authority outside of its own district than it had before the bankrupt statute was enacted. Thus it has

[1] 91 U. S. 517, 23 L. Ed. 414.

been held that a writ of subpœna or other process can not be served beyond the limits of the district of the court issuing the writ.[2] An exception to this rule exists in subpœnas for witnesses under a special provision applicable to courts of bankruptcy, being courts of the United States.[3]

There is no objection to a person living without the district entering his appearance voluntarily. In such case the court has complete jurisdiction over him as though he had been legally served with process.[4] So also if a non-resident of the district comes into the case for the purpose of proving a claim he is subject to the jurisdiction of the court, irrespective of his place of residence,[5] and is bound to take notice of and obey the orders of the court to the same extent as any other party to the proceedings. When a voluntary appearance has been entered it can not be withdrawn without permission of the court.[6] Jurisdiction can not be conferred by consent or voluntary appearance when otherwise the court is without jurisdiction of the subject-matter.[7]

Clearly the words "in their respective territorial limits" do not confine the jurisdiction of the court of bankruptcy to cases

[2] *In re* Waukesha Water Co., 8 Am. B. R. 715, 116 Fed. Rep. 1009; Jobbins v. Montague, No. 7329, Fed. Cas., s. c. 5 Ben. 425; Paine v. Caldwell, No. 10674, Fed. Cas., s. c. 1 Hask. 452; *In re* Hirsch, No. 6529, Fed. Cas., s. c. 2 Ben. 493; *In re* Litchfield, 13 Fed. Rep. 868.

[3] R. S. Sec. 876 provides that "subpœnas for witnesses, who are required to attend a court of the United States, in any district, may run into any other district: *Provided*, That in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." See also B. A. 1898, Sec. 41.

[4] Fisher v. Cushman, (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 867, 4 Am. B. R. 646; *In re* Smith, 117 Fed. Rep. 961, 9 Am. B. R. 98; *In re* Kirtland, No. 7851, Fed. Cas. s. c. 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355.

[5] *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 482; Clay v. Smith, 3 Pet. 411.

[6] *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355. See also U. S. v. Curry, 6 How. 106, 12 L. Ed. 363; Eldred v. Michigan Ins. Bank, 17 Wall. 545, 21 L. Ed. 685.

[7] Jobbins v. Montague, No. 7329, Fed. Cas., s. c. 5 Ben. 425.

arising within the district of the court.[8] Ancillary suits growing out of the original proceedings may be prosecuted in courts of bankruptcy in other districts unless restricted by some other clause of the bankrupt act.[9]

§ 20. Jurisdiction of suits at law and in equity as distinguished from bankruptcy proceedings.

Prior to the decision of the supreme court in Bardes *v.* Hawarden Bank,[1] the district courts and the circuit courts of appeals expressed widely different opinions as to the jurisdiction of the courts of bankruptcy to entertain independent suits at law or in equity against third parties to collect debts or recover property belonging to the bankrupt estate. Most of these courts held that they had jurisdiction of such suits.[2]

It is now settled that the bankruptcy act of 1898 conferred no jurisdiction upon the courts of bankruptcy of suits at law or in equity brought by trustees against third parties to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent under the act, except by consent of the defendant.[3] But the courts of bankruptcy are vested with jurisdiction by the proposed defendant's consent to entertain such suits.[4] It is not necessary that the proposed defendant's consent should be in writing or upon the record in

[8] Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552; Mason v. Hartford P. & F. R. Co., 19 Fed. Rep. 53; Shainwald v. Lewis, 5 Fed. Rep. 513.

[9] See Ancillary Proceedings in other Districts, Sec. 21, *post*.

[1] 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163, 2 N. B. N. 725.

[2] The cases are collated in a note to Bardes v. Hawarden Bank, 4 Am. B. R. 163.

[3] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182; 4 Am. B. R. 177; Hicks v. Knost, 178 U. S. 541, 4 Am. B. R. 178; Jacquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; Wall v. Cox, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727; Real Estate Trust Co. v. Thompson, 112 Fed. Rep. 945, 7 Am. B. R. 520.

[4] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Philips v. Turner (C. C. A., 5th Cir.), 114 Fed. Rep. 726, 8 Am. B. R. 171.

express terms. He will be presumed to consent if he appears and pleads to the merits and will not be allowed thereafter to object to the jurisdiction of the court [5] or withdraw his consent.[6] A stipulation to pay a fund into the registry of the court to be dealt with by that court, the rights of the parties to be determined upon summary petition, is not a consent to the jurisdiction of the court of a plenary suit.[7] A general appearance to a petition will not prevent the defendant from objecting to the jurisdiction of the court to an amended petition, which for the first time states a case against him.[8] Proving a claim in bankruptcy as a secured debt is not such a consent as to give a court of bankruptcy jurisdiction of a controversy by the claimant to enforce such debt in a state court.[9]

Under these decisions, prior to the amendment of February 5, 1903,[10] the trustee was required to resort to the state courts to recover property in the possession of third parties or to collect debts due an estate by persons not parties to the proceedings, "unless by consent of the proposed defendant," and in such cases as could be prosecuted in the circuit courts of the United States under Section 23*a* of the bankruptcy act of 1898.[11]

[5] *In re* Connolly, 100 Fed. Rep. 620, 3 Am. B. R. 842; *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Ryttenberg v. Schefer, 131 Fed. Rep. 313, 11 Am. B. R. 652.

[6] *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

[7] Havens & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569. See also Teschmacher v. Mrazay, 127 Fed. Rep. 728, 11 Am. B. R. 547.

[8] *In re* Hemby-Hutchinson Pub. Co., 105 Fed. Rep. 909, 5 Am. B. R. 569. In *Ex parte* Comingor, 107 Fed. Rep. 808, 5 Am. B. R. 537, affirmed in 184 U. S. 18, 46 L. Ed. 413, the circuit court of appeals for the sixth circuit said:

"It should be observed in this connection that the consent mentioned in Sec. 23*b*, means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. . . . We are, therefore, inclined to think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time he did, which was before the making of the final order, and that the court erred in refusing to entertain it."

[9] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

[10] 32 Stat. at L. 797.

[11] See Sec. 25, *post*.

It should be observed that the limitations of Sec. 23*b* apply only to suits instituted by trustees and do not affect proceedings which may be properly instituted by petitioning creditors before the appointment of a trustee.[12] It does not affect proceedings against trustees.

By the amendment of February 5, 1903, Congress conferred upon the bankruptcy courts jurisdiction of suits for the recovery of property under Sec. 60*b*, Sec. 67*e* and Sec. 70*e*.[13] It has been held that the courts of bankruptcy have jurisdiction of suits at law and in equity by a trustee begun since February 5, 1903, and are not limited to suits brought by trustees appointed in bankruptcy proceedings in which the adjudication took place after the amendment was adopted.[14] The effect of this amendment is unquestionably to confer sufficient jurisdiction at law or in equity upon the courts of bankruptcy for the purpose of recovering property in the possession of third parties claimed as preferential or fraudulent transfers.[15] Congress evidently intended to confer on the courts of bankruptcy full powers at law or in equity in respect to this subject-matter. If a suit in equity is begun, founded upon the recovery of fraudulent transfers, a court of bankruptcy has power to settle all controversies arising out of this subject-matter and for this purpose may entertain cross bills and other pleadings usual in a court of equity.

[12] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432; *In re* Rochford (C. C. A., 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Moody, 131 Fed. Rep. 525, 12 Am. B. R. 718.

[13] Secs. 23*b*, 60*b*, 67*e* and 70*e*, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[14] Pond v. N. Y. Exch. Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343.

[15] Johnston v. Forsyth, 127 Fed. Rep. 845, 11 Am. B. Rep. 669; Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; McNulty v. Feingold, 129 Fed. Rep. 1001, 12 Am. B. R. 338; Horskins v. Sanderson, 132 Fed. Rep. 415; Off v. Hake (C. C. A., 7th Cir.), 142 Fed. Rep. 364, 15 Am. B. R. 696.

To the effect that the bankruptcy court has no jurisdiction to set aside a fraudulent transfer under Section 70*e*, except by consent of the defendant to the jurisdiction as required by Section 23*b*. See Gregory v. Atkinson, 127 Fed. Rep. 183, 11 Am. B. R. 495.

[16] B. A. 1898, Sec. 23*c*. See also Chap. 21.

There is also conferred upon the courts of bankruptcy concurrent with the circuit courts of the United States a limited jurisdiction of suits at law to punish certain offenses named in the act.[16]

§ 20a. Plenary suits against adverse claimants.

It is well settled that summary proceedings on motion and notice or rule to show cause can not be substituted for plenary suits at law or in equity to recover property in the possession of third persons who claim to own it.[1] This applies with equal force to controversies arising before and since the amendment of 1903. The reason for this rule is that such parties would be deprived of the usual processes of law in defense of their rights in a summary proceeding. The defendant in such cases may be entitled to a trial by jury, or to put in evidence upon an issue regularly made by pleadings, or to have the decree or judgment reviewed upon appeal or writ of error, or to have the judgment or decree enforced by execution and not by process for contempt for disobeying a summary order of court.[2]

[1] Jacquith v. Rowley, 188 U. S. 620, 47 L. Ed. 620, 9 Am. B. R. 525; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Marshall v. Knox, 16 Wall. 556, 21 L. Ed. 42; Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748; *In re* Young, (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14; *In re* Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367; *In re* Scherber, 131 Fed. Rep. 121, 12 Am. B. R. 616.

[2] *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed 184 U. S. 18, 46 L. Ed. 413, Judge Severens, speaking for the circuit court of appeals, said:

"The judgment would not be enforced by execution, but by process for contempt. The proceeding when employed for such a purpose is in the nature of a civil remedy for the recovery of money. Quite generally, if not universally, state statutes founded on public policy forbid imprisonment as a remedy to compel the satisfaction of debts or other obligations not founded on wilful wrong, and this policy may not be countervailed by the consent of parties to a proceeding which results in defeating it. And such statutes are given effect in the courts of the United States by Rev. Stat., Secs. 990, 991."

See also Mallory Mfg. Co. v. Fox, 20 Fed. 409, per Wallace C. J.; Low v. Durfee, 5 Fed. Rep. 256, per Lowell C. J.; *Ex parte* Hooson, Law Rep. 7 Ch. App. 251.

The general rule is that the trustee must bring an independent suit at law or in equity to recover money or property in the possession of a person who claims title to it as against the trustee in bankruptcy.[3] It is not necessary in order to be an adverse claimant that he should claim to be the absolute owner of the property in his possession. It is sufficient if money was deposited with him to indemnify him for a liability and that liability has not been determined and satisfied.[4] But a court of bankruptcy has full power by summary proceedings to determine all controversies relating to the title of property which is in the custody of the court or an officer thereof,[5] or to compel a person to deliver to the trustee property, claimed as part of the bankrupt's estate, in his possession to which he has no claim of title as against the trustee, such as a naked bailee,[6] agent[6] or assignee for the benefit of creditors.[7]

The form of pleading is immaterial where the court has jurisdiction to proceed by way of plenary suit and no seasonable objection is taken to the form of procedure, and where

[3] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A., 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537.

As to the right to trial by jury, see Jones v. MacKenzie (C. C. A. 8th Cir.), 122 Fed. Rep. 390.

[4] Jacquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525.

[5] Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Rochford (C. C. A., 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623 (affirmed C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* McBride & Co., 132 Fed. Rep. 285, 12 Am. B. R. 81.

[6] Mueller v. Nugent, 184 U. S. 1, 46 L. E. 405, 7 Am. B. R. 224; 5 Am. B. R. 176; *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

[7] *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

under the form of procedure adopted the rights of the respondent are substantially as in a plenary suit.[8]

It has been held that a plenary suit at law or in equity was necessary in the following cases: An action of replevin to recover specific property,[9] or a suit to set aside fraudulent transfer of money or property and to recover the same for the estate,[10] or to restrain a third party from dealing with property claimed to belong to the bankrupt's estate,[11] or to recover fees paid by an assignee to himself and his attorney for services rendered in a state court,[12] or to recover a judgment which was collected by execution and the money paid over to the judgment creditor before the petition in bankruptcy was filed against the judgment debtor,[13] or a proceeding to fore-

[8] *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; 3 N. B. N. 206; Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444; Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50.

In re Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355, this rule was applied, but not directly decided.

In re Steuer, *supra*, an amendment was permitted to be made to a petition for an injunction and then sustained to recover a preference by Judge Lowell, who said:

"In order that proceedings to recover property may be validly commenced by petition in bankruptcy, the petition must contain a complete statement of the cause of action, and a sufficient prayer for relief. Upon such a petition process must be issued, and the parties must be given full opportunity to present evidence and arguments in their own behalf. In other words, though the formal requisites of a bill in equity may be wanting, yet the substantial requisites of equitable justice must be complied with as fully in a petition in bankruptcy as in a bill in equity."

[9] Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182, 4 Am. B. R. 177; Cook v. Scovil, 53 Atl. Rep. 692.

[10] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Hicks v. Knost, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Michie, 8 Am. B. R. 734, 116 Fed. Rep. 749.

[11] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215.

[12] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, affirming *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; *In re* Klein & Co., 116 Fed. Rep. 523, 8 Am. B. R. 559; *In re* Carver & Co., 113 Fed. Rep. 138, 7 Am. B. R. 539.

[13] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381.

Consult observation of Mr. Justice Brewer in Clark v. Larremore, 188 U. S. at p. 490, 47 L. Ed. 555, 9 Am. B. R. 476.

close a collateral security held by the bankrupt to secure a debt of a third person,[14] or a bill by creditors to reach and subject to their claims exempt property of a bankrupt,[15] or a suit to recover money deposited with a surety to indemnify him for his liability upon a bail bond where that liability has not been determined and satisfied.[16]

It has been held, on the other hand, that the following are not adverse claimants: An assignee for the benefit of creditors,[17] a person who has mere possession of the property without claim of title,[18] or a mortgagee who enters into possession under a default clause in the mortgage before the expiration of the time named in that clause.[19]

§ 21 Ancillary proceedings in other districts.

As has been stated, each court of bankruptcy is restricted in the exercise of its authority within its own territorial limits.[1] It will, however, be necessary to institute proceedings ancillary to and in aid of the proceedings in bankruptcy in courts without the district in which the principal proceedings are had.[2]

That the courts of bankruptcy for such other districts have jurisdiction to entertain auxiliary proceedings to perfect and accomplish the objects of the act can hardly be considered an open question in view of the decisions of the courts under prior acts and the reasoning upon which these decisions are

[14] McKey v. Smith, 105 Fed. Rep. 899, 5 Am. B. R. 568.

[15] Woodruff v. Cheeves (C. C. A. 5th Cir.), 105 Fed. Rep. 601, 5 Am. B. R. 296.

[16] Jacquith v. Rowley, 188 U. S. 620, 47 L. Ed. 526, 9 Am. B. R. 525.

[17] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 160 Fed. Rep. 312, 6 Am. B. R. 262.

[18] *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

[19] *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427.

[1] Sec. 19, *ante*.

[2] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Peiser, 115 Fed. Rep. 199, 7 Am. B. R. 690; *In re* Sutter Bros., 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 352.

based.[3] That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them and is in harmony with the scope and design of the act.

Where property belonging to the bankrupt's estate is without the territorial jurisdiction of the court of bankruptcy administering the estate, the court of bankruptcy within whose territorial jurisdiction the property is situate may, upon ancillary proceedings, appoint a receiver to take charge of it whenever it is absolutely necessary for the preservation of the estate.[4] A court of bankruptcy of another district than that in which the bankruptcy proceedings are pending may entertain a suit by a trustee for the recovery of assets of the bankrupt,[5] and grant an injunction to prevent a transfer of or interference with such property.[6] A receiver generally can not maintain an ancillary suit for such purpose.[7] It has

[3] Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Sherman v. Bingham, No. 12762, Fed. Cas., s. c. 3 Cliff. 552; Moore v. Jones, No. 9768 Fed. Cas., s. c. 23 Vt. 739; *Ex parte* Martin, No. 9149 Fed. Cas., s. c. 5 Law Rep. 158; Goodall v. Tuttle, No. 5533 Fed. Cas., s. c. 3 Biss. 219; *In re* Tifft, No. 14034 Fed. Cas., s. c. 19 N. B. N. 201; Shainwald v. Lewis, 5 Fed. Rep. 513; Mason v. Hartford P. & F. R. Co., 19 Fed. Rep. 53.

[4] *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Sutter Bros., 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 353.

But see Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 Fed. Rep. 403, 10 Am. B. R. 624.

In re Tybo Mining Co., 132 Fed. Rep. 697, 13 Am. B. R. 62, a petition for the appointment of an ancillary trustee was denied on the ground of want of jurisdiction.

[5] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; *In re* Peiser, 115 Fed. Rep. 199, 7 Am. B. R. 690; Lathrop v. Drake, 99 U. S. 516, 23 L. Ed. 414; Sherman v. Bingham, No. 12762 Fed. Cas., 3 Cliff. 552.

[6] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297.

But see *In re* Williams, 120 Fed. Rep. 38, 9 Am. B. R. 741; *In re* von Hartz (C. C. A. 2d Cir.), 142 Fed. Rep. 726, 15 Am. B. R. 747.

[7] Great Western Mining Co. v Harris, 198 U. S. 561, 49 L. Ed. 1163; Booth v. Clark, 17 How. 338, 15 L. Ed. 164; Guarantee Title & Trust Co. v. Pearlman, 16 Am. B. R. 461.

That a receiver in bankruptcy is a temporary custodian merely, see Whitney v. Wenman, 198 U. S. 539, 553, 49 L. Ed. 1157; Boonville Nat. Bank v. Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13.

been held that a court of bankruptcy in the exercise of ancillary jurisdiction may order the examination of witnesses under Section 21*a*.[8]

The courts of other districts, so far as an ancillary jurisdiction exists, are auxiliary, not in any sense implying power to carry out and enforce the judgment and orders of one another, except upon due process in the particular district.[9] In such cases it is necessary to acquire jurisdiction of persons and property by the same means employed in other cases.[9]

§ 22. Power to stay proceedings in other courts.

The same reason does not exist for refusing to interfere by injunction to stay proceedings in a federal court that exists when the case is pending in a state court. The courts of bankruptcy have enjoined proceedings in federal courts when such proceedings interfered with the exercise of bankruptcy jurisdiction.[1]

All courts of the United States are forbidden to stay proceedings in any court of a state, except in cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy.[2] The bankruptcy act of 1898 expressly confers power upon courts of bankruptcy to issue injunctions to stay proceedings within this exception.[3]

[8] *In re* Sutter Bros., 131 Fed. Rep. 654, 11 Am. B. R. 632.

But see *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538.

As to the examination of witnesses residing without the district see Sec. 210*a*, *post*.

[9] Shainwald v. Lewis, 5 Fed. Rep. 513.

[1] *In re* People's Mail Steamship Co., No. 10970 Fed. Cas., s. c. 3 Ben. 226, the court of bankruptcy enjoined proceedings in admiralty upon a libel *in rem*. But see The Ironsides, No. 7069 Fed. Cas., s. c. 4 Biss. 518.

[2] R. S. Sec. 720; Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; Peck v. Jenness, 7 How. 625, 12 L. Ed. 841.

[3] B. A. 1898, Sec. 11*a* and Sec. 2, clause 15; Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *In re* Kenney, 105 Fed. Rep. 897, 5 Am. B. R. 355; Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; Blake, Moffat & Towne v. Francis Valentine Co., 89 Fed. Rep. 691, 1 Am. B. R. 372; *In re* Gutwillig, 90 Fed. Rep. 475, on rehearing, p. 481, s. c. (C. C. A. 2d Cir.), 92 Fed. Rep.

The court has power to stay any suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of the petition against him.[4] It should be observed that this power is limited to suits founded upon a claim from which a discharge would be a release.[5] The word "suit" is broad enough in its scope to include all forms of procedure at law or in equity, or in admiralty, where the personal liability of the debtor is sought to be fixed or determined by final judgment. The stay may be had at any stage in the suit while it is pending in the state court, even after execution,[6] and before the sheriff has paid the money to the execution creditor.[7]

Under the act of 1867 power to grant injunctions was expressly conferred for the purpose of preventing any transfer or disposition of the debtor's property or any interference therewith.[8] This power was frequently exercised.[9] The

337, 1 Am. B. R. 388; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261, s. c. 174 U. S. 590, 43 L. Ed. 1048, 2 Am. B. R. 463.

[4] B. A. 1898, Sec. 11*a*; *In re* Kenney, 95 Fed. Rep. 427, 2 Am. B. R. 494, s. c. Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16; *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; Bear v. Chase (C .C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Lesser (C. C. A. 2d Cir.), 99 Fed. Rep. 913, 3 Am. B. R. 758.

In re Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774, a suit on an unliquidated claim, which might be proved in bankruptcy, but was voluntarily withheld for fifteen months, was stayed.

[5] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16; *In re* Cole, 106 Fed. Rep. 837, 5 Am. B. R. 780; Continental National Bank v. Katz (Supr. Ct. Cook Co., Ill), 1 Am. B. R. 19.

[6] *In re* Kletchka, 92 Fed. Rep. 901, 1 Am. B. R. 479; *In re* De Lany & Co., 124 Fed Rep. 280.

[7] *In re* Kenney, 95 Fed. Rep. 427, s. c. *sub nom* Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

But see *In re* Shoemaker, 112 Fed. Rep. 648, 7 Am. B. R. 437.

[8] Act of March 2, 1867; 14 Stat. at L. 536; R. S. Sec. 5024.

[9] Chapman v. Brewer, 114 U. S. 158, 29 L. Ed. 83; *In re* Mallory, No. 8991 Fed. Cas., s. c. 1 Saw. 88, 6 N. B. N. 22; Markson v. v. Hughes, No. 7076 Fed. Cas., s. c. 1 Dill. 497, 4 N. B. N. 510; Irving v. Hughes, No. 7076 Fed. Cas. s. c. 2 N. B. N. 61; Jones v. Leach, No. 7475 Fed. Cas., s. c. 1 N. B. N. 595; *In re* Wallace, No. 17094 Fed. Cas., s. c. Deady 433, 2 N. B. N. 134.

same power has been exercised under the provisions of the present act.[10]

The court of bankruptcy has also exercised jurisdiction to enjoin suits against the bankrupt instituted after the commencement of the bankruptcy proceedings,[11] or against a trustee for conversion of property sold by order of the bankruptcy court.[12]

An application to stay suits may be made to the state court in which the suit is pending,[13] or to a court of bankruptcy. The provisions of the bankruptcy act relating to staying suits is binding upon the state courts and is applied and enforced by them quite as much as by the bankruptcy courts.[14]

The application to the state court is usually made by petition or motion supported by a certified copy of the petition in bankruptcy. Where the adjudication has been made before the application in the state court a certified copy of the order should also be filed in the state court. A copy of this petition or motion and exhibits should be served on the plaintiff and brought to the notice of the state court.[15] If a proper case is

[10] *In re* Gutman, 114 Fed. Rep. 1009, 8 Am. B. R. 252; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261, s. c. 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re* Gutwillig (C. C. A. 2d Cir.), 92 Fed. Rep. 337, 1 Am. B. R. 388, affirming 90 Fed. Rep. 475; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re* Emslie (C. C. A. 2d. Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689.

[11] *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 236; *In re* Chambers, Calder & Co., 98 Fed. Rep. 805, 3 Am. B. R. 537; *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R. 604.

See also White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178.

[12] *In re* Mertens, 131 Fed. Rep. 507, 12 Am. B. R. 698.

[13] As was done in Continental Nat. Bk. v. Katz (Supr. Ct. Cook County, Ill.), 1 Am. B. R. 19; Reid v. Cross (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 34; Victor v. Lewis (N. Y. Supr. Ct. App. Div.), 1 Am. B. R. 667; Reed v. Equitable Trust 115 Ga. 780, 8 Am. B. R. 242.

[14] *In re* Geister, 97 Fed. Rep. 322, 3 Am. B. R. 228; Carter v. People's Nat. Bank, 35 S. E. Rep. 61, 4 Am. B. R. 211 (note); Reed v. Equitable Trust, 115 Ga. 780, 8 Am. B. R. 242; Delavergne v. Farrand, 1 Mich. (N. P.) 90; Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[15] *In re* Geister, 97 Fed. Rep. 322, 3 Am. B. R. 228, the court said:

"The bankrupt who is the defendant in the state court should file

made the state court will order proceedings stayed in accordance with Section 11*a* of the bankruptcy act; that is, until after an adjudication or the dismissal of the petition. If the debtor has been adjudged a bankrupt, the stay may be until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined. If the discharge has been granted it should be pleaded in the state court in bar of the suit instead of making an application to stay the suit.

The application to stay suits in a state court may be made in the court of bankruptcy administering the estate. The application for an injunction should be filed in the clerk's office and not in that of the referee.[16] The application is regularly made by the bankrupt, the petitioning creditors or the trustee, if one has been appointed. It is made by petition or motion supported by affidavits. The affidavit may be sworn to by the attorney of the creditors, when they live at a distance and his authority to make the application will be presumed.[17] The petition should state the suit, the court in which it is pending, the cause of action, and show that it is founded upon a debt provable in bankruptcy and that the suit is one that may be properly stayed.[18] The petition should also state the names of the persons to be enjoined. If such persons are not already before the court they must be brought in by subpœna.[19] The authority of a court of bankruptcy to enjoin

in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in Section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the state court to grant the stay prayed for."

[16] *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[17] *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156.

[18] *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Klein, 97 Fed. Rep. 31, 3 Am. B. R. 174; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126; Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746.

[19] See Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

Sec. 2, clause 6, of the act authorizes the court of bankruptcy "to bring in and substitute additional persons or parties in proceedings in

proceedings in a state court should be exercised through persons subject to the jurisdiction of the bankruptcy court and the writ of injunction directed to them and not to the state court.[20]

The proceedings upon such an application may be *ex parte* and stay may be granted before the subpœna is served upon the bankrupt. The injunction and the subpœna to new parties may be served at the same time.[21]

The application for a stay of proceedings must be heard and decided by the judge and not by the referee.[22] The judge may refer such an application or any specific issue arising thereon to the referee to ascertain and report the facts,[22] but the judge must make the order granting or refusing the injunction.

The court of bankruptcy has exclusive power to determine whether the suit pending in the state court is one founded upon a provable claim and whether it should be stayed or not.[23] Whether the court will exercise this extraordinary power rests in the sound discretion of the judge.[24] This dis-

bankruptcy when necessary in the complete determination of the matter in controversy."

[20] *Ex parte* Christy, 3 How. 292, 11 L. Ed. 603; Samson v. Burton, No. 12285 Fed. Cas., s. c. 5 Ben. 343.

[21] In Stengel v. The Leidigh Carriage Co., in the district court for the southern district of Ohio (not reported), the Leidigh Carriage Co. of Dayton, on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount of something like $50,000. Attachments were issued and levies made under these judgments prior to the assignment, and some or all of the property had been sold, but the funds arising therefrom had not been distributed. Upon an application for an injunction Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from taking any further proceedings in the state court. The injunction and subpœna were served at the same time.

[22] Gen. Ord. 12, par. 3. *In re* Siebert, 133 Fed. Rep. 781, 13 Am. B. R. 348. See *In re* Benjamin, 140 Fed. Rep. 320, 15 Am. B. R. 351.

[23] Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596.

[24] *In re* Knight, 125 Fed. Rep. 35, 39, 11 Am. B. R. 1, Judge Evans said:

"Doubtless the court, while it may, under Sec. 11 of the statute, stay proceedings in actions in a state court in certain cases, can decline to exercise its jurisdiction and power in that respect. But this de-

cretion can be reviewed by a circuit court of appeals on petition for review,[25] but will not be interfered with by the appellate court unless it appears that it has been abused.

A stay will be granted only when some benefit to the bankrupt's estate will be derived thereby. Thus a suit to foreclose a mortgage or other lien may be stayed when the property is likely to be sold for more than the amount of the lien debt,[26] but not when it is insufficient to pay it.[27]

The courts of bankruptcy have granted injunctions to stay proceedings in the state courts in the following cases: attachment suits,[28] an action upon an unliquidated claim which might be liquidated and proved in bankruptcy,[29] a suit to enforce a mechanic's lien,[30] or a suit to foreclose a mortgage,[31]

pends entirely upon its own discretion—a discretion which can not be controlled otherwise than by appellate proceedings in a higher court. This discretion has been exercised by this court in several instances—among them, in the case of Holloway, 93 Fed. Rep. 639, and in the case of Porter, 109 Fed. Rep. 111. Doing this did not depend upon any want of power in such cases, but because it was discreet not to exercise the power, inasmuch as no benefit could come to the general creditors by staying a suit in the state court, the entire avails of which must go to the plaintiff in the action there pending."

[25] As was done in Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Kenney (C. C. A. 2d Cir.), 105 Fed. Rep. 897, 5 Am. B. R. 355; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653.

[26] *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770; *In re* San Gabriel Sanitorium Co. (C. C. A. 9th Cir.), 102 Fed. Rep. 310, 4 Am. B. R. 197; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Nathan, 92 Fed. Rep. 590.

[27] Heath v. Shaffer, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 650; *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[28] Bear v. Chase (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re* Goldberg, 117 Fed. Rep. 602, 9 Am. B. R. 156; *In re* Eastern Com. & Imp. Co., 129 Fed. Rep. 847, 12 Am. B. R. 305.

[29] *In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.

[30] *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126.

But see *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508.

[31] *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770; *In re* San Gabriel Sanitorium Co.

a sheriff from paying money collected upon execution to the judgment creditor,[32] a trust company from paying proceeds of a sale deposited with it to abide a final judgment in a state court,[33] an action by a plaintiff against his bankrupt vendee,[34] to prevent arrest and imprisonment upon an execution issued from a state court,[35] an action of ejectment by a landlord,[36] or distress by a landlord when tenant is afterwards adjudicated bankrupt,[37] or a bankrupt fireman's discharge from service,[38] a bank from endorsing a promissory note given by a debtor of the bankrupt,[39] to prevent a transfer of property mortgaged by the mortgagee,[40] a proceeding in the state court which would defeat the provisions of a bankrupt act or interfere with the administration of the estate of the debtor,[41] and proceedings under a general assignment for the benefit of creditors.[42]

(C. C. A. 9th Cir.), 102 Fed. Rep. 310, 4 Am. B. R. 197; *In re* Pittlekow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Nathan, 92 Fed. Rep. 590.

But see Heath v. Shaffer, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

[32] *In re* Kenney, 95 Fed. Rep. 427, s. c. Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; *In re* Vastbinder, 132 Fed. Rep. 718, 13 Am. B. R. 148.

[33] *In re* Riker, 107 Fed. Rep. 96, 5 Am. B. R. 720.

[34] *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16.

[35] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80.

[36] *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537.

[37] *In re* Lines, 133 Fed. Rep. 803, 13 Am. B. R. 318.

[38] *In re* Hicks, 133 Fed. Rep. 739, 13 Am. B. R. 654.

[39] *In re* Jackson, 94 Fed. Rep. 797, 2 Am. B. R. 501.

[40] *In re* Nathan, 92 Fed. Rep. 590.

[41] *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 309; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re* Gutman, 114 Fed. Rep. 1009, 8 Am. B. R. 252; *In re* Russell (C. C. A. 2d. Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658.

See also White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178.

[42] *In re* Krinsky, 112 Fed. Rep. 972, 7 Am. B. R. 535; *In re* Knight, 125 Fed. Rep. 35; 11 Am. B. R. 1; *In re* Gutwillig (C. C. A. 2d Cir.), 90 Fed. Rep. 481, 1 Am. B. R. 338; 92 Fed. Rep. 337, 1 Am. B. R. 388; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261, s. c. 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

Consult Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

The courts of bankruptcy have refused to stay suits in the following cases: a suit founded upon a claim from which a discharge would not be a release,[43] as a suit to enforce alimony,[44] or an action founded in fraud,[45] or controversies relating to exempt property,[46] or an execution on judgment in a suit upon a bail bond,[47] a creditor's bill or other suit to enforce a valid lien or attachment begun more than four months prior to the commencement of bankruptcy proceedings,[48] a replevin action where the property is in the possession of the state court,[49] or generally where the property in controversy is lawfully in the possession of the state court having jurisdiction to administer the same,[50] an action against a marshal individually for trespass,[51] an action to foreclose a lien and for personal judgment,[52] an action to enjoin third parties

[43] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; Continental Nat. Bank v. Katz (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 19; *In re* Cole, 106 Fed. Rep. 837, 5 Am. B. R. 780; *In re* Shepard, 97 Fed. Rep. 187, 5 Am. B. R. 857; Mackel v. Rochester, 135 Fed. Rep. 984, 14 Am. B. R. 429.

[44] *In re* Shepard, 97 Fed. Rep. 187, 5 Am. B. R. 857.

See also Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. 139.

[45] *In re* Cole, 106 Fed. Rep. 837, 5 Am. B. R. 780.

[46] White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; Roden Grocery Co. v. Bacon, 133 Fed. Rep. 515, 13 Am. B. R. 251.

See also Lockwood v. Exch. Bk., 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 709.

[47] *In re* Franklin, 106 Fed. Rep. 666; Jacquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525.

[48] Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36, reversing *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815; *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542; *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35; Reed v. Equitable Trust, 115 Ga. 780, 8 Am. B. R. 242; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79.

[49] *In re* Wells, 114 Fed Rep. 222, 8 Am. B. R. 75.

[50] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Frazier v. Southern Loan & Trust Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 3 Am. B. R. 710; Tennessee Producer Marble Co. v. Grant, 135 Fed. Rep. 322, 14 Am. B. R. 288. See also Sec. 23, *post*.

[51] McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115.

[52] *In re* Greater American Exposition, 102 Fed. Rep. 986, 4 Am. B. R. 486; Reed v. Equitable Trust 115 Ga. 780, 8 Am. B. R. 242.

from disposing of property which the court of bankruptcy can not order paid to a trustee,[53] to enjoin creditors from prosecuting their claims against a corporation to judgment for the purpose of fixing the statutory liability of its officers and stockholders.[54] But the execution of such judgment against the bankrupt corporation will be enjoined.[54]

The language of the injunction should be in accordance with the statute. If the application is made before an adjudication the stay should be until after the adjudication or dismissal of the petition.[55] If the debtor has been adjudged a bankrupt the suit may be stayed until twelve months after the date of such adjudication, and if within that time such person applies for a discharge, then until the question of such discharge is determined.[56] No injunction should be granted to stay a suit after the discharge is granted.[57] If an injunction had been granted prior to the discharge it should be dissolved when the discharge is granted.[58]

When an injunction is issued it should be served upon the parties personally, but it is not necessary where the parties have actual notice of its issuance.[59]

Staying a suit in a state court is not a dismissal. It does not defeat the cause of action, provided no discharge is granted. It merely suspends proceedings in the state court so long as the injunction is in force. Future action in the state court depends upon the action of the court of bankruptcy. If a discharge is refused the injunction is dissolved. If the discharge is granted the bankrupt may plead it in the suit.[60]

[53] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215; *In re* Browne, 104 Fed. Rep. 762, 5 Am. B. R. 220.

But see *In re* Smith, 113 Fed. Rep. 993, 8 Am. B. R. 55.

[54] *In re* Remington Auto. & Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468.

[55] B. A. 1898, Sec. 11*a*.

[56] B. A. 1898, Sec. 11*a*.

[57] B. A. 1898, Sec. 11*a*.

[58] *In re* Flanders, 121 Fed. Rep. 936; *In re* Rosenthal, 108 Fed. Rep. 368, 5 Am. B. R. 799; *In re* Herzberg, 25 Fed. Rep. 699.

[59] *In re* Krinsky, 112 Fed. Rep. 972, 7 Am. B. R. 535.

[60] *In re* Wesson, 88 Fed. Rep. 855; *In re* Rosenberg, No. 12054

When the suit is pending in another district from that in which the original case is pending, it would seem that the court of bankruptcy for such district might issue the injunction in the exercise of ancillary jurisdiction.[61]

If no steps are taken to stay proceedings in a state court, or a stay is refused, such proceedings, after the adjudication in bankruptcy are valid and binding.[62] The fact that the plaintiff in the state court proves his claim in bankruptcy does not operate to deprive the state courts of jurisdiction, nor amount to a consent to the exercise of exclusive jurisdiction by the court of bankruptcy.[63] If a case is not stayed the trustee may apply to the court of bankruptcy for leave to prosecute and defend such pending suits.[64]

Any party in interest may move to dissolve the injunction.[65] If the stay of proceedings was improperly granted the court of bankruptcy may set aside the order upon motion seasonably filed for that purpose.[66] A restraining order is binding and conclusive upon all parties until it is set aside.[67]

§ 23. Power to obtain possession of property—In custodia legis.

Where property, claimed to belong to the estate of the bankrupt, is voluntarily surrendered to the trustee in bankruptcy there can be no controversy.

Fed. Cas., s. c. 3 Ben. 14; *In re* Thomas, No. 13890 Fed. Cas., s. c. 3 N. B. N. 38; Banque-Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Ruiz v. Eickerman, 5 Fed. Rep. 790.

[61] Sherman v. Bingham, No. 12762 Fed. Cas., s. c. 3 Cliff. 552; Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414. See Ancillary Jurisdiction, Sec. 21. *Contra*, *In re* Richardson, No. 11774 Fed. Cas., s. c. 2 Ben. 517; *In re* Williams, 120 Fed. Rep. 38, 9 Am. B. R. 741.

[62] Boynton v. Ball, 121 U. S. 466-7, 30 L. Ed. 985; Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Metcalf v. Barker, 187 U. S. 165, 44 L. Ed. 122, 9 Am. B. R. 36; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; Reed v. Equitable Trust Co 115 Ga. 780, 8 Am. B. R. 242.

[63] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

[64] B. A. 1898, Sec. 11*b* and *c*.

[65] *In re* Rosenthal, 108 Fed. Rep. 368, 5 Am. B. R. 799.

[66] *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35.

[67] Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596.

Where the property is in the possession of the bankrupt or his agent, at the time the petition in bankruptcy was filed, the court of bankruptcy in which the case is pending may summarily order him to deliver to the trustee such property and commit him for contempt if he fails to do so.[1]

Where property, claimed to belong to the bankrupt, is in the possession of a third party at the time of filing the petition in bankruptcy, who claims title to it as against the trustee, the court of bankruptcy can not summarily order such property delivered to the trustee. A plenary suit at law or in equity must be brought to recover it either in a court of bankruptcy or a state court. This subject has been considered elsewhere.[2]

Where property is in the actual and lawful possession of a state court or an officer thereof and such court has jurisdiction to administer such property, its possession will not ordinarily be disturbed by process issued by a court of bankruptcy.[3] Thus where the possession of a state court is acquired by a judgment creditor's suit begun more than four months prior to bankruptcy,[4] or where a receiver has taken possession of property under an order of a state court,[5] or where property is in the possession of administrators and executors,[6] or

[1] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262.

[2] Sec. *20a, ante.*

[3] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Frazier v. Southern L. & T. Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 3 Am. B. R. 710; *In re* Price, 92 Fed. Rep. 987, 1 Am. B R. 606; *In re* Heckman (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 15 Am. B. R. 500.

[4] Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Frazier v. Southern L. & T. Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 3 Am. B. R. 710.

[5] *In re* Price, 92 Fed. Rep. 987, 1 Am. B. R. 606.

[6] Byers v. McAuley, 149 U. S. 608, 37 L. Ed. 867; Wickham v. Hull, 60 Fed. Rep. 326; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489; Moses v. Pond (N. Y. Sup. Ct.), 4 Am. B. R. 655.

sheriffs and marshals,[7] a court of bankruptcy will not ordinarily disturb such possession. The general rule of comity in this respect is recognized and applied by the courts of bankruptcy and the state courts so far as their jurisdiction is concurrent.[8]

But where the possession of the state court would have the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may seize such property for the purpose of administering it in accordance with that law.[9] The reason for this is that the bankruptcy law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts.[10] In this respect the state courts have not concurrent jurisdiction with the courts of bankruptcy and the general rule of comity has no application. The bankruptcy law is paramount and should not be defeated by proceedings in a state court. A court of bankruptcy will not interfere with property in the possession of a state court, except where that possession was acquired in a proceeding de-

[7] Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390; Krippendorf v. Hyde, 110 U. S. 276, 28 L. Ed. 145; Senior v. Pierce, 31 Fed. Rep. 625; Gumbel v. Pitkin, 124 U. S. 131, 31 L. Ed. 374; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749.

[8] See Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Frazier v. Southern Loan & Trust Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 3 Am. B. R. 710; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841.

Speaking of the general rule of comity in this respect, in Compton v. Jesup, 68 Fed. Rep. 263, 278-9, s. c. 15 C. C. A. 397, 412-3, Judge Taft said:

"Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down by the supreme court of the United States in a long line of cases."

[9] *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 309; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; Hooks v. Aldridge (C. C. A. 5th Cir.), 145 Fed. Rep. 865; *In re* Watts & Sachs, 190 U. S. 1.

[10] *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 786.

clared null and void by the Bankrupt Act. Thus an assignee for the benefit of creditors in a state court, where the assignment is charged as an act of bankruptcy upon which an adjudication was made, may be compelled to deliver property in his possession as such assignee, to the trustee in bankruptcy,[11] or a sheriff of a state court may be compelled to pay to the trustee money collected upon an execution on a judgment void under Sec. 67*f*, which he has not paid to the judgment creditor,[12] but not when the money has been paid over to the judgment creditor.[13] Where property is in the possession of a receiver of a state court, the appointment of which receiver constitutes an act of bankruptcy upon which an adjudication is made, the receiver may be compelled to deliver assets of the debtor in his possession to a receiver or trustee in bankruptcy subsequently appointed.[14]

The court of bankruptcy may take possession of property in the possession of a garnishee, because a garnishee is not

[11] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *In re* Thompson, 122 Fed. Rep. 174, affirmed (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 11 Am. B. R. 719; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1.

[12] *In re* Kenney, 95 Fed. Rep. 427, s. c. Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

[13] *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re* Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381.

See observation of Mr. Justice Brewer in Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

[14] *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; Hooks v. Aldridge (C. C. A. 5th Cir.), 145 Fed. Rep. 865.

In re Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113, the supreme court says at p. 28: "The (state) court should have directed the surrender of the property to him (the receiver in bankruptcy) at once, or at least after the report of its own receiver after returning from Indianapolis." And again at p. 35: "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvents' estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

the officer of a court,[15] or in the possession of an officer of a state court who seized the property without legal process or warrant.[16]

Where the property is in the actual custody of a state court the better practice is to apply to the state court to turn over the property to the trustee or receiver in bankruptcy, even in cases where the court of bankruptcy may order such surrender.[17] The court of bankruptcy may stay proceedings to

[15] Chase v. Cannon, 47 Fed. Rep. 674.

But see Mack v. Winslow, 59 Fed. Rep. 316; 8 C. C. A. 134.

[16] *In re* Tyler, 104 Fed. Rep. 778, 5 Am. B. R. 152.

See also Jervey v. The Carolina, 66 Fed. Rep. 1013.

As to the effect of collusive proceedings to get property out of the custody of a court, see Daniels v. Lazarus, 65 Fed. Rep. 718; Gumbel v. Pitkin, 124 U. S. 131, 31 L. Ed. 374.

[17] *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; Wilson v. Parr, 115 Ga. 629, 8 Am. B. R. 230.

In re Knight, 125 Fed. Rep. 35, Judge Evans said: "It seems so clear, from the bankruptcy law, as construed by the highest courts, that the rights of the receiver, acquired under the circumstances shown by the testimony, are subordinate to those of the trustee and to those of the bankruptcy court, that it is not doubted that the Fulton circuit court will acquiesce in that view, and, upon proper application made to it, will order the receiver to turn over to the trustee the property in his hands. To the end that an application for that purpose may be made, further proceedings upon the rule will for the present be held in abeyance. It would not only be unseemly, but altogether disagreeable to this court, to pursue any course which would be wanting in the utmost respect and courtesy to the state tribunal, and orders will be made directing the trustee to apply to that court for leave to enter a special appearance in the case there pending, styled "First National Bank of Fulton v. Henry Knight and others," for the purpose of filing a copy of this opinion, the orders made in pursuance thereof, a copy of the adjudication in bankruptcy, and an accompanying application for an order of that court directing its receiver to turn over to the trustee in bankruptcy the property of the bankrupt held by the receiver. For the purpose of giving ample opportunity for doing this, the rule will be respited until the 12th day of October, 1903, at which time the trustee will report what has been done in the premises."

(The state court took the same view of the law, and on October 1st ordered its receiver to turn over to the trustee in bankruptcy all the property in his hands.)

In Carpenter Bros. v. O'Connor, 16 O. C. C. 526, an application was made to the state court for an order directing a receiver appointed by

permit an application for this purpose to the state court. The application to the state court is regularly made by petition or motion suported by affidavits. A certified copy of the petition in bankruptcy and order of adjudication, if one has been made, should be exhibited to the state court. In practice the state courts have regularly passed an order to turn over the property to the bankruptcy court to be administered without the necessity of issuing process from the bankruptcy court.

In order to place property in the custody of a state court there must be a seizure under process of the court or some act equivalent thereto to obtain actual possession. Filing a judgment creditor's bill and service of process is an equitable attachment,[18] but the mere beginning of an action does not ordinarily bring the assets of the debtor into the custody of a state court. This has been held true of a suit to foreclose a mortgage.[19]

Where the property has come into the judicial custody of a court of bankruptcy, or an officer thereof, as referee, trustee or receiver, the state court has no power upon its process to take such property out of the judicial custody of the court of bankruptcy.[20] This includes the property of third parties

that court after an adjudication in a court of bankruptcy, to deliver property of the bankrupt in his possession to a trustee, subsequently appointed by the creditors in the proceeding in bankruptcy, on the ground that the trustee's title vested as of the date of adjudication and prior to the property coming into the possession of the receiver. The application was granted.

In Hooks v. Aldridge (C. C. A. 5th Cir.), 145 Fed. Rep. 865, the property in the possession of the state receiver was sold pursuant to an agreement between the receiver and the trustee that the proceeds be deposited in bank to await the decision of the circuit court of appeals as to who was entitled to the custody and control of the property.

[18] Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36.

[19] Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[20] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178, 2 N. B. N. 721; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388;

claiming a title adverse to the bankrupt or trustee, where the officer of the court of bankruptcy has acquired peaceable possession of the property.[21]

The filing of a petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction.[22] The effect of filing such a petition is to place the property of the bankrupt constructively in the custody of the court of bankruptcy. Especially if the petition is subsequently sustained by the court.[23] Where the petition is dismissed it may be doubted if the mere filing of a petition will be held such custody as to render void dealings with such property pending an adjudication.

A claimant of such property in the custody of the bank-

In re Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 244; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992; *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836; *In re* Kellogg, 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* Weinger, Bergmann & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 613.

[21] *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79; Haven & Geddes Co. v. Pierek (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 9 Am. B. R. 569; Antigo Screen Door Co., 123 Fed. Rep. 249, 10 Am. B. R. 359.

In O'Dell v. Boyden (C. C. A. 6th Cir.), 148 Fed. Rep. ——, 17 Am. B. R. ——, speaking of a seat in the New York Stock Exchange, Judge Lurton said: "It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive and not manual, but it is only so because such property is not capable of a more tangible custody."

[22] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; *In re* Reynolds, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re* Weinger, Bergmann & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Shuster Co. (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180; *In re* Mertens, 131 Fed. Rep. 507, 12 Am. B. R. 698.

[23] *In re* Schermerhorn (C. C. A. 8th Cir.), 145 Fed. Rep. 341, 16 Am. B. R. 507; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Weinger, Bergmann & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424. Consult White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Brooks, 91 Fed. Rep. 508, 1 Am. B. R. 531; Wayne Knitting Mills Co. v. Nugent, 104 Fed. Rep. 530, 4 Am. B. R. 747, s. c. 184 U. S. 1, 46 L. Ed. 405.

ruptcy court must apply to that court to have it restored, and his right to intervene in the bankruptcy proceedings is well established.[24] If property in the lawful possession of the court of bankruptcy is seized under process from the state court, the court of bankruptcy may by summary proceedings compel the return of such property.[25] If a suit is begun in a state court affecting property in the custody of a court of bankruptcy, it may stay such proceedings.[26]

§ 24. When a circuit court may have jurisdiction of bankruptcy proceedings.

The bankrupt statute confers no general power, either original or supervisory, upon the circuit courts to entertain bankruptcy proceedings.[1]

Where there is no jury in attendance upon the district court a case may be certified for trial to the circuit court sitting at the same place, or, by consent of parties, when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance. This has special reference to a trial by jury with respect to the question of the bankrupt's insolvency and any act of bankruptcy alleged to have been committed by him, upon an involuntary petition.[2]

A limited jurisdiction of controversies at law and in equity is conferred upon the circuit courts by Section 23. Such cases

[24] Sec. 16*a ante*. Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 646; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79.

[25] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178, 2 N. B. N. 721; *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224.

[26] Keegan v. King, 56 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992; *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R. 604.

See also Sec. 22, *ante*.

[1] Hatch v. Curtin, 146 Fed. Rep. 200.

[2] B. A. 1898, Sec. 19.

are incidental to, but are not strictly, proceedings in bankruptcy.[3]

The bankruptcy proceedings, strictly so called, may be certified to the circuit court for the district in case the district judge is disqualified.[4]

The authority for such proceedings is found in the Revised Statutes.

Sec. 601. "Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and, also, an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein."

Sec. 637. "When any cause, civil or criminal, of whatever nature, is removed into a circuit court, as provided by law, from a district court wherein the same is cognizable, on account of the disability of the judge of such district court,

[3] Sec. 25, *post.*

[4] In Farrund, Williams & Clark v. Milburn & Co. (eastern district of Michigan, 1899, not reported), the district judge was disqualified by reason of being related to one of the parties. The case was certified to the circuit court and the circuit judge, Taft, ordered a warrant to seize the goods of the alleged bankrupt pursuant to Sec. 69, and to hold the same until the petition should be dismissed or an adjudication be made and a trustee duly appointed and qualified. The case thereafter proceeded in the circuit court.

But see comment of the circuit court of appeals for the fifth circuit on this practice. *In re* Seebold, 105 Fed. Rep. 910, 5 Am. B. R. 358.

See also Spencer v. Lapsley, 20 How. 264, 15 L. Ed. 902.

or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party to such cause as to render it improper, in his opinion, for him to sit on the trial thereof, such circuit court shall have the same cognizance of such cause, and in like manner, as the said district court might have, or as said circuit [court] might have if the same had been originally and lawfully commenced therein, and shall proceed to hear and determine the same accordingly." [5]

§ 25. Jurisdiction of the circuit courts at law and in equity.

The bankrupt statute confers no jurisdiction in bankruptcy, either original, supervisory or appellate, upon the circuit courts of the United States.[1] But they "have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." [2]

A controversy, in order that it may be cognizable, under this clause, in the circuit courts of the United States, *first*, must be a controversy at law or in equity, as distinguished from proceedings in bankruptcy; *second*, the parties must be a trustee in bankruptcy and adverse claimants; *third*, the controversy must be concerning property acquired or claimed by the trustee; and, *fourth*, it must be such a proceeding as could have been instituted by the bankrupt had no proceedings

[5] Consult also R. S. Secs. 587 to 590; Spencer v. Lapsley, 20 How. 264, 15 L. Ed. 902; *Ex parte* United States, No. 14411, Fed. Cas., s. c. 1 Gall. 338; The Richmond, 9 Fed. Rep. 863; Wallace v. Loomis, 97 U. S. 146, 156, 24 L. Ed. 895.

[1] Hatch v. Curtin, 146 Fed. Rep. 200.

[2] B. A. 1898, Sec. *23a;* Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328; McFarlan Carriage Co. v. Solanas (C. C. A. 5th Cir.), 106 Fed. Rep. 145, 5 Am. B. R. 422; Spencer v. Duplan Silk Co., 191 U. S. 526; Hatch v. Curtin, 146 Fed. Rep. 200; Bush v. Elliott, 202 U. S. 477.

in bankruptcy intervened. All four of these conditions must concur to give jurisdiction.

Controversies at Law and in Equity.—This clause can not be construed as vesting in the circuit courts jurisdiction of controversies at law or in equity of which they have not already jurisdiction.[3] It is rather a regulation of jurisdiction. What are controversies at law or in equity are to be determined by the general rules of jurisprudence. No fixed rule can be stated defining precisely what are suits at law or in equity as distinguished from bankruptcy proceedings. The question has been frequently considered by the supreme court, and each particular case was held either to be the one or the other, without attempting to lay down a general rule of distinction.[4]

The district and circuit courts were given concurrent jurisdiction of suits at law and in equity, as distinguished from bankruptcy proceedings, under the act of 1867.[5] Actions at law and suits in equity were frequently before the court in matters relating to bankruptcy. Thus the parties sought the aid of the court in actions of replevin,[6] in assumpsit,[7] in

[3] In Viquesney v. Allen (C. C. A. 4th Cir.), 131 Fed. Rep. 21, 12 Am. B. R. 402, it was held that a circuit court had no jurisdiction of a bill in equity by a simple contract creditor to set aside a fraudulent conveyance "as an ancillary proceeding to bankruptcy proceedings."

See also Hatch v. Curtin, 146 Fed. Rep. 200; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

[4] Consult Spencer v. Duplan Silk Co., 191 U. S. 526; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; Hatch v. Curtin, 146 Fed. Rep. 200; Morgan v. Thornhill, 11 Wall. 65, 75, 20 L. Ed. 60; Smith v. Mason, 14 Wall. 419, 430, 20 L. Ed. 748; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; McFarlan Carriage Co. v. Solanas (C. C. A. 5th Cir.), 106 Fed. Rep. 145, 5 Am. B. R. 422.

As to the distinction between controversies at law and equity and proceedings in bankruptcy, see Sec. 16*a*, *ante*.

[5] R. S. Sec. 4979.

[6] Haughey v. Albin, No. 6222 Fed. Cas., s. c. 2 Bond 244.

[7] Street v. Dawson, No. 13533 Fed. Cas., s. c. 4 N. B. R. 207; Van Dyke v. Tinker, No. 16849 Fed. Cas., s. c. 11 N. B. R. 308.

trover [8] and by a bill in equity.[9] These cases are useful to illustrate the distinction between suits at law or in equity and proceedings in bankruptcy.

Parties and Adverse Claims.—It is essential that one party shall be the trustee and the other party an adverse claimant, or claimants, and that the controversy be concerning the property acquired or claimed by the trustee.[10] This provision is very similar to that used in the act of 1867, which was "any person claiming an adverse interest . . . touching any property or rights of the bankrupt transferable or vested in such assignee." [11] This provision was frequently construed by the courts.[12]

If the trustee is dead and no one has been appointed in his

[8] Carr v. Gale, No. 2434 Fed. Cas., s. c. 2 Ware 330, and No. 2435 Fed. Cas., s. c. 3 Woodb. & M. 38; Mitchell v. McKibben, No. 9666 Fed. Cas., s. c. 8 N. B. R. 548; Brooke v. McCraken, No. 1932 Fed. Cas., s. c. 10 N. B. R. 461; Babbitt v. Walbrun, No. 695 Fed. Cas., s. c. 6 N. B. R. 339; Wadsworth v. Tyler, No. 17032 Fed. Cas., s. c. 2 N. B. R. 316; Cragen v. Carmichael, No. 3319 Fed. Cas., s. c. 2 Dill. 519.

[9] *In re* Bowie, No. 1728 Fed. Cas., s. c. 1 N. B. R. 628; March v. Heaton, No. 9061 Fed. Cas., s. c. 1 Low. 278; Bradshaw v. Klein, No. 1790 Fed. Cas., s. c. 2 Biss. 20; Shaffer v. Fritchery, No. 12697 Fed. Cas., s. c. 4 N. B. R. 548; Taylor v Rasch, No. 13801 Fed. Cas., s. c. 5 N. B. R. 399; Wilt v. Stickney, No. 17854 Fed. Cas., s. c. 15 N. B. R. 23; Warren v. Nat. Bank, No. 17202 Fed. Cas., s. c. 10 Blatch. 493; Bank v. Cooper, 20 Wall. 171; Garrison v. Markley, No. 5256 Fed. Cas., s. c. 7 N. B. R. 246; Sutherland v. Lake Superior Canal Co., No. 13643 Fed. Cas., s. c. 9 N. B. R. 298; Beecher v. Bininger, No. 1222 Fed. Cas., s. c. 7 Blatch. 170; Kellogg v. Russell, No. 7666 Fed. Cas., s. c. 11 Blatch. 519.

[10] As to who are adverse claimants under this act, see Sec. 20*a*, *ante*.

[11] R. S. Sec. 4979.

[12] Consult Morgan v. Thornhill, 11 Wall. 65, 75, 20 L. Ed. 60; Smith v. Mason, 14 Wall. 419, 430, 20 L. Ed. 748; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Bachman v. Packard, No. 709 Fed. Cas., s. c. 2 Saw. 264; Carr v. Gale, No. 2434 Fed. Cas., s. c. 2 Ware, 330, and No. 2435 Fed. Cas., s. c. 2 Woodb. & M. 38; Mitchell v. McKibben, No. 9666 Fed. Cas., s. c. 8 N. B. R. 548; Street v. Dawson, No. 13533 Fed. Cas., s. c. 4 N. B. R. 207; Haughey v. Albin, No. 6222 Fed. Cas., s. c. 2 Bond 244; Brooke v. McCraken, No. 1932 Fed. Cas., s. c. 10 N. B. R. 461; Spaulding v. McGovern, No. 13217 Fed. Cas., s. c. 10 N. B. R. 188.

stead, a creditor may file a bill to detain property of a bankrupt to be administered by a trustee subsequently appointed.[13]

Who are necessary parties to such actions at law or suits in equity is determined by the general rules governing such proceedings in the circuit courts.

The Status of the Bankrupt Determines Jurisdiction.—The circuit courts have jurisdiction only in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such a controversy had been between the bankrupt and the adverse claimants. This clause is a limitation upon the exercise of the jurisdiction of the circuit courts.

The judiciary act of 1887, as amended August 13, 1888,[14] conferred jurisdiction upon the circuit courts in "cases arising under the constitution and laws of the United States." It is well settled that where the plaintiff holds an office like that of a receiver appointed by the court, or a receiver of a national bank, that the suit involves a federal question, and may be prosecuted in the circuit courts without regard to the citizenship of the parties. This rule was applied under the act of 1867 with reference to assignees.[15] A trustee, being an officer of the court under the present act, would have undoubtedly been entitled to have prosecuted suits in the circuit courts on this ground, were it not for the restriction contained in section 23*a*. As it is, however, in order that the circuit courts may take cognizance of the controversy, there must exist a diversity of citizenship, as between the bankrupt and the adverse claimants, and the amount involved must exceed two thousand dollars.[16] It has been held that a bankrupt,

[13] Clark v. Clark, 17 How. 315, 15 L. Ed. 77.

[14] 25 Stat. at L. 433.

[15] Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 546; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Woolridge v. McKenna, 8 Fed. Rep. 650; Payson v. Dietz, No. 10861 Fed. Cas., s. c. 2 Dill. 504; Atkinson v. Purdy, No. 616 Fed. Cas., s. c. Crabbe 551; Wehl v. Wald, No. 17356 Fed. Cas., s. c. 17 Blatch. 342; Connor v. Scott, No. 3119 Fed. Cas., s. c. 4 Dill. 242.

[16] Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; Swofford v. Cornucopia Mines, 140 Fed. Rep. 957; Spencer v. Duplan Silk Co., 191 U. S. 526, 11 Am. B. R. 563.

who absconds a few days before bankruptcy proceedings are instituted, does not thereby change his citizenship so as to deprive the circuit court for that district of jurisdiction of a suit brought by his trustee to recover property for the bankrupt estate.[17] The citizenship of the trustee is immaterial.[18] The averments of the first pleading must show that all these jurisdictional requisites exist.

When a suit is begun in a state court in which these jurisdictional requisites exist, it may be removed to a circuit court and there tried as if originally begun there.[19] A trustee or receiver in bankruptcy can remove a case to a circuit court only when the amount in controversy exclusive of interest and costs exceeds $2,000.[20] A suit can not be removed which could not have been begun in a circuit court.

[17] Sims v. Union Assur. Soc., 129 Fed. Rep. 804.

[18] Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

[19] Spencer v. Duplan Silk Co., 191 U. S. 526; s. c. (C. C. A. 3d Cir.), 115 Fed. Rep. 689, 8 Am. B. R. 367, reversing 112 Fed. Rep. 638, 7 Am. B. R. 563.

[20] Swofford v. Cornucopia Mines, 140 Fed. Rep. 957, 15 Am. B. R. 564.

CHAPTER V.

REFEREES.

§ 26. The appointment, removal and districts of referees.

The office of referee is created by statute.[1] Referees are officers of the courts of bankruptcy. They are appointed within the territorial limits of each court of bankruptcy by the judge of that court.[2]

The number of referees rests in the discretion of the judge.[3] There should be a sufficient number to expeditiously transact the bankruptcy business within each district. The term of office is two years.[4] They are, however, at all times subject to removal by the judge, because their services are not needed, or for other cause.[4] Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act or may appoint another referee, or another referee holding an appointment under the same court may, by the order of the judge, temporarily fill the vacancy.[5] A referee ought not to perform any official acts after his term expires and before he has been re-appointed and qualified. Any official act performed after the expiration of his term would be valid on the theory that he is a referee *de facto*.[6]

[1] B. A. 1898, Sec. 33.

[2] B. A. 1898, Sec. 34.

[3] B. A. 1898, Sec. 37; Bray v. Cobb, 1 Am. B. R. 153; 91 Fed. Rep. 102.

[4] B. A. 1898, Sec. 34.

[5] B. A. 1898, Sec. 43. See Bray v. Cobb, 91 Fed. Rep. 102; *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868.

[6] The acts of a justice of the peace or other officer after his official term has expired are valid. Read v. Buffalo, 3 Keyes (N. Y.), 447; Hamlin v. Kassafer, 15 Ore. 456; Brown v. Lunt, 37 Me. 423; Petersilea v. Stone, 119 Mass. 465; Hale v. Bischoff, 53 Kan. 301.

The acts of a *de facto* judge are valid. McDowell v. United States, 159 U. S. 596; 40 L. Ed. 271; Ball v. United States, 140 U. S. 118, 35 L. Ed. 377; *In re* Manning, 139 U. S. 504, 35 L. Ed. 264.

The court is also authorized to designate and from time to time change the districts of referees, so that each county where the services of a referee are needed may constitute at least one district.[7]

§ 27. Qualifications of referees.

No person is eligible to be a referee unless he is competent to perform the duties of that office.

Under the act of 1867 no person was eligible for appointment as register unless he was an attorney at law.[1] Although no such restriction is contained in the present statute, judges of some of the districts have publicly announced that no person would be appointed a referee unless he is an attorney. It may be doubted if a person may be considered competent to perform the duties unless he has pursued studies in law and been admitted to practice in a court of record.

No person is eligible for the appointment if he holds any "office of profit or emolument under the laws of the United States or of any state, other than commissioners of deeds, justices of the peace, masters in chancery or notaries public." [2] By profit or emolument is meant "the profit arising from office or employment; that which is received as a compensation for services or which is annexed to the position of office as salary, fees and perquisites." [3] Such are the office of postmaster,[4] U. S. surveyor general,[5] inspector of customs,[6] county recorder or county commissioner,[7] or a member of a state legislature.[8]

No person is eligible for appointment who is related by consanguinity or affinity within the third degree, as determined by the common law, to any of the judges of the courts

[7] B. A. 1898, Sec. 34.

[1] R. S. Sec. 4994.

[2] B. A. 1898, Sec. 35.

[3] Century Dictionary, subject, Emolument; Standard Dictionary, subject, Emolument; Webster's Dictionary, subject, Emolument; Apple v. Crawford Co., 105 Pa. St. 300.

[4] McGregor v. Balch, 14 Vt. 428.

[5] People v. Whitman, 10 Cal. 38.

[6] Crawford v. Dunbar, 52 Cal. 36.

[7] Dailey v. State, 8 Blackf. (Ind.) 329.

[8] State v. Valle, 41 Iowa 29.

of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed.[9] Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other." [10]

No person is eligible to appointment unless he resides in or has his office in the territorial district for which he is to be appointed.[11]

§ 28. The oath and bond of a referee.

The referee must take the same oath of office as that prescribed for the judges of the United States courts.[1]

Before entering upon the duties of his office every referee must enter into a bond to the United States in such sum as shall be fixed by the court, not to exceed $5,000, conditioned for the faithful performance of his official duty.[2] The court fixes the time within which the bond is to be given and approves the sureties. If a referee fails to give bond within such time he is deemed to have declined the appointment and there is a vacancy in his office.[3] There shall be at least two sureties upon each bond, each of whom must qualify in a sum equal at least to the amount of the bond.[4] Corporations organized for the purpose of becoming sureties on bonds, or authorized by law to do so, may be accepted as sureties.[5] The court shall require evidence as to the actual value of the prop-

[9] B. A. 1898, Sec. 35.

[10] 2 Black. Com. 206; Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Addams, 45 Penn. St. 432.

[11] B. A. 1898, Sec. 35.

[1] B. A. 1898, Sec. 36, Form No. 33; R. S. Sec. 712.

[2] B. A. 1898, Sec. 50*a*.

[3] B. A. 1898, Sec. 50*k*.

[4] B. A. 1898, Sec. 50*c* and *f*.

[5] B. A. 1898, Sec. 50*g*.

erty of sureties, and all sureties must be approved by the court.[6] Such bonds are filed of record in the office of the clerk.[7] They may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.[7] Such suits must be brought within two years after the alleged breach of the bond.[8]

§ 29. General powers of referees.

The territorial jurisdiction of a referee is generally limited by the county or district for which he is appointed,[1] except when he is specially designated by the judge to temporarily fill a vacancy in another county or district within the jurisdiction of the court.[2]

Referees are appointed for the purpose of assisting the judge of the court of bankruptcy in the performance of his duties. The referee has the same power generally as the judge has in the performance of his judicial duties under the bankrupt act, subject to a few exceptions to be noted presently.[3] After a case has been referred to a referee all the proceedings thereafter, except such as are required by the statute or general orders to be had before the judge, are had before the referee.[4] The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee, and at such times and places the referees may perform the duties which they are empowered by the act to perform.[4]

The referee has power to act only by virtue of a reference by the clerk or the judge of a court of bankruptcy.

The clerk is required to refer a petition in case the judge

[6] B. A. 1898, Sec. 50*a, d.*

[7] B. A. 1898, Sec. 50*h.*

[8] B. A. 1898, Sec. 50*l.*

[1] B. A. 1898, Sec. 38 and Sec. 34, clause 2.

[2] B. A. 1898, Sec. 43; Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. Rep. 102; *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868.

[3] B. A. 1898, Sec. 38; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; *In re* Tudor, 96 Fed. Rep. 942, 2 Am. B. R. 808.

[4] Gen. Ords. 12 and 20 B. A. 1898, Sec. 38, clause 4.

is absent from the district or the division of the district.[5] A voluntary petition should be referred immediately, an involuntary petition on the next day after the last day on which pleadings may be filed.[6] Such references are general in their nature.

The judge, after an adjudication, may refer the case generally to a referee or specially with only limited authority to act in the premises or to consider and report upon specified issues.[6] The power of the referee in such cases depends upon the order of reference. The judge may refer the case to any referee within the territorial jurisdiction of the court if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district;[7] or for the convenience of parties or for cause he may transfer a case from one referee to another within the same district.[8]

The statute provides that the word "court" when used in the statute may include the referee and that the word "judge" excludes the referee.[9] Consequently the referee has no power to perform these duties which are imposed by the act on the judge alone; *first,* to issue a warrant to the marshal against the bankrupt to compel his immediate examination or detention upon satisfactory proof that the bankrupt is about to leave the district;[10] *second,* to confirm or set aside compositions and order distribution of the consideration;[11] *third,* to extend the time for filing a petition for his discharge by the bankrupt, to hear applications for a discharge, to refuse or grant the same, and to revoke discharges once granted;[12] *fourth,* to determine the issues presented whenever the facts alleged in a petition for involuntary bankruptcy are contro-

[5] B. A. 1898, Sec. 18, *f* and *g;* Official Form No. 15, Form No. 32, *post.*

[6] B. A. 1898, Sec. 22.

[7] B. A. 1898, Sec. 22.

[8] B. A. 1898, Sec. 22*b*; *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868.

[9] B. A. 1898, Sec. 1, cl. 7 and 16.

[10] B. A. 1898, Sec. 9, cl. *b,* and Sec. 38, cl. 4.

[11] B. A. 1898, Sec. 12*d* and Sec. 13*a;* Gen. Ord. 12, cl. 3.

[12] B. A. 1898, Secs. 14 and 15, and Sec. 38, cl. 4; Gen. Ord. 12, cl. 3.

verted by either the bankrupt or his creditors;[13] *fifth,* to punish or commit persons who have disobeyed the orders or process of courts of bankruptcy or misbehaved during a hearing, even though the contempt be with reference to the process or orders of, or in the presence of the referee who can only certify the facts to the judge for his action;[14] *sixth,* to refer causes after adjudication either generally or specifically to a referee, and transfer causes from one referee to another;[15] and, *seventh,* to order notices to creditors to be given otherwise than by the referee.[16] The referee should not collect the estate of the bankrupt nor issue subpœnas; these should be done by the trustee and clerk respectively.[17]

There are also certain powers ordinarily to be exercised by the judge, but which are to be exercised by the referee only when the judge is absent from the division of the district in which the proceedings are pending and they are referred or certified by the clerk to the referee. These are: *first,* to make adjudications on voluntary and on uncontested involuntary petitions;[18] and, *second,* to take possession of the bankrupt's property pending the adjudication and release it.[19] This last power may be exercised by the referee also on certification of the judge's illness or inability to act,[19] but adjudications can

The statute also confers on the referee jurisdiction to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on "courts" of bankruptcy and as shall be prescribed by rules or orders.[20] Accordingly the General Orders of the supreme court have further limited the powers of the referees by providing that applica-

[13] B. A. 1898, Sec. 18*d*.

[14] B. A. 1898, Sec. 41*b*, and see *post,* "Proceedings in Contempt." Chap. XXII.; Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

[15] B. A. 1898, Sec. 22.

[16] B. A. 1898, Sec. 58*c*.

[17] *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[18] B. A. 1898, Sec. 18*e*, *b* and *g*, and Sec. 38, cl. 1, and "Power to make an adjudication"; Sec. 30, *post.*

[19] B. A. 1898, Secs. 69 and 38, cl. 3; and "Power to take possession, etc."; Sec. 32, *post.*

[20] B. A. 1898, Sec. 38, cl. 4.

tions for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the "judge."[21] This provision is new and not modeled upon any rule or order promulgated under any previous bankrupt act. The power of the supreme court to thus limit the power of a referee cannot be questioned.[22] It is only in bankruptcy cases that a federal court can enjoin a proceeding in a state court.[23] The propriety of confiding in the judge alone the right to exercise this extraordinary power is in accord with the rule of comity that should be observed between courts of bankruptcy and the state courts. If no general order or rule of court limited the power of a referee in this respect he would be authorized, under the general power conferred on him by the Bankruptcy Act, to issue injunctions. He still has "jurisdiction to issue injunctions directed to any party not an officer of the United States or of a state, unless the injunction stays the proceedings of the court."[24] In other words, he may exercise jurisdiction to grant injunctions except as limited by Gen. Ord. 12, clause 3.

Where the bankrupt has not made a deposit for the fees of the clerk, referee, and trustee, the judge may order these fees paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[25] There is no law or rule authorizing a referee to make such an order.[26]

In all orders made by a referee it must be recited, according

[21] Gen. Ord. 12, cl. 3; *In re* Siebert, 133 Fed. Rep. 781, 13 Am. B. R. 348; *In re* Berkowitz, 143 Fed. Rep. 598.

[22] B. A. 1898, Sec. 30 and Sec. 38, clause 4. *In re* Siebert, 133 Fed. Rep. 781, 13 Am. B. R. 348; *In re* Berkowitz, 143 Fed. Rep. 598.

[23] R. S. Sec. 720.

[24] Judge Lowell *In re* Steuer, 104 Fed. Rep. 976, 980, 5 Am. B. R. 209, 214, approved by Judge McPherson *In re* Berkowitz, 143 Fed. Rep. 598, 16 Am. B. R. 251.

Injunction by referee sustained *In re* Benjamin, 140 Fed. Rep. 320, 15 Am. B. R. 351.

[25] Gen. Ord. 35, par. 4; *In re* Plympton, 103 Fed. Rep. 775.

[26] *In re* Plimpton, 103 Fed. Rep. 775, 4 Am. B. R. 614.

as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.[27]

The action of referees is subject always to review by the judge of the court of bankruptcy.[28] It would therefore appear that in any proceeding before a referee a party is at liberty to take the opinion of the judge upon any point or matter arising in the course of such proceeding.[29]

The referee is required to preside at the first meeting of the creditors in the absence of the judge,[30] but he should not interfere with or influence the choice of trustee.[31] He can, however, pass on the right of a person who claims to be a creditor, to vote.[32] Where a trustee is elected by creditors the referee can not remove him and appoint another, but should report his disapproval to the judge, who alone can remove the trustee elected.[33] It is his duty to prepare a list of debts proved at this meeting,[34] and to notify the trustee of his appointment and the penal sum of his bond.[35] In the absence of an appointment of a trustee by the creditors he may appoint the trustee;[36] but should only do so where the creditors have

[27] Gen. Ord. 23.

[28] Gen. Ord. 27. B. A. 1898, Sec. 38 and Sec. 2, clause 10.

[29] See Sec. 32*a*.

[30] B. A. 1898, Sec. 55*b*.

[31] *In re* Smith, No. 12971 Fed. Cas., 2 Ben. 113.

[32] *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel, 109 Fed. Rep. 861 at 865, 6 Am. B. R. 305.

[33] Gen. Ord. 13; *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; but see *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811.

[34] Official Form No. 19, see Form No. 38, *post*.

[35] Gen. Ord. 16; Official Form No. 24, see Form No. 43, *post*.

[36] B. A. 1898, Sec. 44; Official Form No. 23, see Form No. 42, *post; In re* Mackellar, 116 Fed. Rep. 547; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 158; *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162; *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50; *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631.

Where there are no assets the referee may in his discretion order that no trustee be appointed. *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190.

had full opportunity to elect one and have failed.[37] The referee regularly approves the bond of the trustee.[38] The referee may furnish on application a certified copy of any proceeding before him to be used as evidence in a state or federal court. Certified copies of proceedings before a referee, or of papers, when issued by the referee, are admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.[39]

Referees can not act in cases in which they are directly or indirectly interested,[40] practice as attorneys and counselors at law in bankruptcy proceedings, or purchase, directly or indirectly, any property of an estate in bankruptcy.[41]

§ 30. Power to make an adjudication.

Every referee within his own territorial limits has power to consider all petitions referred to him by the clerk and make the adjudications or dismiss the petitions.[1] This includes petitions in involuntary as well as in voluntary bankruptcy. It is the duty of the clerk to refer a petition, in either voluntary or involuntary bankruptcy, to the referee whenever the judge is absent from the district or the division of the district.[2] It is regularly the duty of the judge to consider the petition and make the adjudication thereon.[3] A referee has power to consider the petition and make the adjudication only when the petition has been specially referred to him for that

[37] *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* Mackellar, 116 Fed. Rep. 547.

[38] Official Form No. 26, see Form No. 45, *post.*

[39] B. A. 1898, Sec. 21*d*.

[40] The fact that a referee owes a debt to the bankrupt does not disqualify him. Bray v. Cobb, 91 Fed. Rep. 102, 1 Am. R. 153.

[41] B. A. 1898, Sec. 39*b*; Cobb v. Bray, 91 Fed. Rep. 102, 1 Am. B. R. 153.

[1] B. A. 1898, Sec. 38, clause 1; Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post.*

[2] B. A. 1898, Sec. 18, clauses *f* and *g*.

[3] B. A. 1898, Sec. 2, clause 1; Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post.*

purpose. The action of the referee in such cases is subject to review by the judge.[4]

When there is a reference by the clerk of a petition it may be considered in the nature of a default. The consideration necessary is probably the same as that required in taking a decree *pro confesso*. The matter of the petition ought to be opened and explained to the referee so that he may see that a proper case of bankruptcy is made. It is not necessary that he should hear evidence in addition to the affidavit attached to the petition. If such a proper case is made by the petition it is the duty of the referee to adjudge the person a bankrupt. The case then proceeds as though the adjudication had been made by the judge.

§ 31. Power to administer oaths and examine witnesses.

Referees are also authorized to exercise the powers vested in courts of bankruptcy for the administration of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.[1] The subpœna should be issued by the clerk, not by the referee.[2]

The referee is given power to administer the oaths required by the bankrupt act in all cases except upon hearings in court.[3]

Under these provisions the referee is empowered to take evidence with reference to questions pending before him, and to summon witnesses for the purpose of examining them. The subpœna must be duly issued by the clerk of the court of bankruptcy.[4] Subpœnas for witnesses may run into another district, provided no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place

[4] B. A. 1898, Sec. 38*a*; Gen. Ord. 27.

[1] B. A. 1898, Sec. 38, clause 2.

[2] *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[3] B. A. 1898, Sec. 20, clause 1

[4] Gen. Ord. 3; R. S. Secs. 911 and 912; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

of residence, and only in case his lawful mileage and fees for one day's attendance shall be first paid or tendered to him.[5]

Generally any witness competent to testify in a court of bankruptcy may be compelled by subpœna to appear and bring with him documents and papers mentioned in the subpœna. It, however, may be doubted if the referee has power to compel a trustee to appear as a witness or to produce documents.[6] The court in proper cases may call the trustee to an account, but whether the referee has a supervisory power of this character may be questioned.

The referee is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate, at a compensation not to exceed ten cents per folio for reporting and transcribing proceedings before him.[7] He may, when necessary, employ a clerk, whose hire will be paid as part of the costs of administration.[8]

The examination of witnesses before the referee[9] may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee must be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee has no power to exclude evidence offered,

[5] B. A. 1898, Sec. 41; R. S. Sec. 876; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760; *In re* Cole, 133 Fed. Rep. 414, 13 Am. B. R. 300; *In re* Kerber, 125 Fed Rep. 653, 10 Am. B. R. 747; *In re* Woodward, No. 18000 Fed Cas., s. c. 12 N. B. R. 297.

[6] *In re* Hicks, 2 Fed. Rep. 351; but see B. A. 1898, Sec. 49.

[7] B. A. 1898, Sec. 38, clause 5; *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830; as to taxing such fees as costs see *In re* Todd, 6 Am. B. R. 88, 109 Fed. Rep. 265.

[8] *In re* Pierce, 111 Fed. Rep. 576. 5 Am. B. R. 747; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[9] Gen. Ord. 22; B. A. 1898, Sec. 39, clause 9. See also Examinations, Sec. 208, *post.*

although he may decide it to be incompetent, immaterial and irrelevant.[10] He must note upon the deposition any question objected to, with his decision thereon, and the court has power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

The referee has no power to punish for contempt committed in proceedings before him.[11] Where a person, in proceedings before a referee, disobeys or resists any lawful order or process or writ, misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent documents, or refuses to appear after having been properly summoned, or upon hearing refuses to take an oath as a witness, or, having taken the oath, refuses to be examined according to law,[12] proceedings must be taken in the court of bankruptcy for commitment. In such cases the referee certifies the facts to the judge. The judge, in a summary manner, hears the evidence as to the acts complained of and makes such orders, and decrees such punishment as he would had the contempt been committed in proceedings before the court.[13]

§ 32. Power to take possession and release the bankrupt's property.

It is properly within the province of the judge to take possession and release the property of the bankrupt. Yet the referee is clothed with this power, provided the clerk issues a certificate showing the absence of the judge from the judicial district or the division of the district, or his sickness or

[10] *In re* Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206; *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785; *In re* Lipset, 119 Fed. Rep. 379, 9 Am. B. R. 32. But see *In re* Wilde's Sons, 131 Fed. Rep. 142, 11 Am. B. R. 714.

[11] Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

[12] B. A. 1898, Sec. 41.

[13] B. A. 1898, Sec. 41 and Sec. 2, clauses 13 and 16. See also Contempt, Chap. XXII, *post*.

inability to act.[1] This language evidently means that the referee has the same power to act in cases properly referred to him as the judge has when no reference is made. The referee has no authority to take possession of or release the property under any other circumstances.

The referee may appoint a receiver or the marshal, upon application of parties in interest, in case it shall be necessary for the preservation of the estate, to take charge of the property of the bankrupt at any time after the filing of the petition and until it is dismissed or the trustee is qualified.[2] If necessary for the best interest of the estates, the referee may authorize the business of the bankrupt to be conducted for a limited period by a receiver, the marshal or the trustee.[3]

In case it becomes necessary to take possession of the property after the petition is filed and before an adjudication, a warrant may issue to the marshal to seize and hold the property subject to further orders.[4] In such cases an indemnity bond, in such an amount as the referee shall fix, with such sureties as he shall approve, is required. Such property may be released upon the bankrupt giving a bond in such sum and with such sureties as the referee may approve. In case the petition is dismissed the referee has power to release the property. After the adjudication the referee may direct a receiver appointed by him or a marshal to take possession of the property before the trustee is appointed. In such case no bond is required.

It should be observed, however, that the referee has power to act only in the absence of the judge, or his sickness, or disability to act. If any person refuses to obey a proper order

[1] B. A. 1898, Sec. 38, clause 3. See also B. A. 1898, Sec. 69.

[2] B. A. 1898, Sec. 2, clause 3, and Sec. 38, clause 4.

In re Maher [not reported], at Cincinnati, Referee Waite appointed a receiver of a stable of horse on the application of a voluntary bankrupt, who was unable to obtain hay and grain to feed them. The receiver was in possession until a trustee was appointed.

Where the property is of a perishable nature, see *In re* Vila, No. 16941 Fed. Cas., s. c. 5 Law Rep. 17; Gen. Ord. 18.

[3] B. A. 1898, Sec. 2, clause 5, and Sec. 38, clause 4.

[4] B. A. 1898, Sec. 38, clause 3, and Sec. 69.

of the referee the court may enforce it by an order of attachment for contempt.[5] The referee may also have the property insured by the direction of the judge.[6]

As soon as a trustee is appointed and qualified he is vested by law with the title to the bankrupt's property as of the date of the adjudication, except property exempt by law,[7] and is entitled to the possession of the property. The bankrupt regularly surrenders possession of his property to the trustee. If the bankrupt does not turn over his property to his trustee the referee has power to order him to do so.[8]

§ 32a. Review of referees' rulings by judge.

Any ruling or order of a referee may be reviewed by the judge of the court of bankruptcy.[1] When a bankrupt, creditor, trustee or other person desires a review by the judge of any order made by the referee, he must file with the referee his petition therefor, setting out the errors complained of; and the referee shall certify to the judge the questions presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[2] It is a specific order or ruling which may be reviewed. A general review of the proceedings before the referee is not contemplated.[3]

A bankrupt, creditor, trustee or other person may apply for a review of the ruling or order of the referee. The application should be made by a person interested or whose rights are affected by the ruling or order complained of.

The application should be in the form of a petition filed with the referee.[4] The petition should be filed after the order

[5] *In re* Speyer, 42 How. Prac. 307; *In re* Kempner, No. 7689 Fed. Cas., s. c. 6 B. R. 521.

[6] *In re* Carow, 41 How. Prac. 112.

[7] B. A. 1898, Sec. 70.

[8] *In re* Tudor, 96 Fed. Rep. 942, 2 Am. B. R. 808.

[1] B. A. 1898, Sec. 2, cl. 10; Gen. Ord. 27.

[2] Gen. Ord. 27. *In re* Kurtz, 125 Fed. Rep. 992, 11 Am. B. R. 129.

[3] *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

[4] Gen. Ord. 27; *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *In re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re* Hawley, 116 Fed. Rep. 428, 8 Am. B. R. 632.

or ruling sought to be reviewed has been made by the referee [5] and not before.[6] No time is specified in the statute or general orders within which this petition must be filed, but the courts have held that it must be within a reasonable time.[7]

The petition should clearly set forth the error complained of and pray that the order or ruling of the referee may be reviewed.[8]

The petition should be signed by the petitioner or his attorney. It need not be verified by an affidavit for the reason that it does not allege facts. The facts are brought up by the certificate or record of the evidence.

When such a petition has been filed with the referee he must forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[9] The summary of the evidence mentioned in General Order 27 may be all the evidence taken stenographically or the substance thereof as agreed upon by the parties.[10] The summary and not the complete evidence should be certified whenever the rules of justice will permit.[11] Where this is done the district court may require original evidence or parts thereof certified to it.[12] If exhibits are attached

[5] *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *In re* Scott, 90 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re* Reukauff Sons & Co., 135 Fed. Rep. 251, 14 Am. B. R. 344.

[6] *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190.

[7] *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Chambers, Calder & Co., 6 Am. B. R. 709; *In re* Reliance Storage and Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49; Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302; *In re* Milgraum & Ost, 133 Fed. Rep. 802, 13 Am. B. R. 337; *In re* Heebner, 132 Fed. Rep. 1003, 13 Am. B. R. 256; *In re* Grant, 143 Fed. Rep. 661, 16 Am. B. R. 256; *In re* Koenig & Van Hoogenhuyze, 127 Fed. Rep. 891; *In re* Scherr, 138 Fed. Rep. 695, 14 Am. B. R. 794.

[8] For forms of petition, see Forms Nos. 130 to 134. *post.*

[9] Gen. Ord. 27. For form of certificate, see Forms Nos. 135 to 139, *post.* *In re* Kurtz, 11 Am. B. R. 120, 125 Fed. Rep. 992.

[10] B. A. 1898, Sec. 39*a*, cl. 5 and 9.

[11] Cunningham v. German Nat. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302.

[12] Cunningham v. German Nat. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Crim

to the certificate they should be referred to in the certificate and marked in some manner to identify them.

It has been held that exceptions may be taken to the proceedings and contained in the certificate and exhibits attached to it.[13] Where a referee makes a ruling upon the admissibility of evidence in the course of an examination the certificate should show the ruling and the question should be answered in any case and the examination continued, and the question decided by the court after the deposition is completed.[14]

The certificate should be prepared and signed by the referee and by him transmitted to the clerk of the court.

When the certificate is filed in the clerk's office it becomes the duty of the judge to consider and confirm, modify or overrule, or return with instructions for further proceedings such record and findings.[15] If the question be improperly certified the court may refuse to give an opinion.[16]

The case is regularly set for hearing upon the petition and exhibits without answer or pleading on the part of the respondent. The judge will usually hear arguments of counsel.

v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302.

[13] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541; *In re* Carver, 113 Fed. Rep. 138, 7 Am. B. R. 539; Carolina Cooperage Co., 96 Fed. Rep. 604, 3 Am. B. R. 154.

In re Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237; Judge Lowell said: "Counsel for the joint creditors raised certain formal objections, based upon the state of the record. It is sufficient to say that this court has not hitherto required, and does not intend to require hereafter, any particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out, that is enough. No formal exceptions to the referee's findings or rulings need be filed. If this practice shall seem lax to some, the answer is that it has hitherto been found convenient in this district, both for the judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there."

[14] *In re* Lipset, Levittan & Co., 119 Fed. Rep. 379, 9 Am. B. R. 32; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[15] B. A. 1898, Sec. 2, cl. 10.

[16] *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re* Reukauff Sons & Co., 135 Fed. Rep. 251, 14 Am. B. R. 344.

If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him,[17] or refer the matter to the referee for further proofs.

Ordinarily the review by the judge of an order made by the referee will be confined to the errors pointed out in the petition for review, but the judge may properly consider any point presented by the record then before him whether such point was or was not discussed before or by the referee.[18]

The judge reviews both law and fact. No fixed rule can be laid down with reference to the weight to be given by the judge to the finding of fact by the referee in making his ruling or order.[19]

[17] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641.

[18] *In re* Samuel Wilde's Sons (C. C. A. 2d Cir.), 144 Fed. Rep. 972, 16 Am. B. R. 386; *In re* Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723.

[19] *In re* Grant Bros., 118 Fed. Rep. 73, 9 Am. B. R. 93; *In re* Carver, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re* Covington, 110 Fed. Rep. 143, 6 Am. B. R. 373; *In re* Mayer, 98 Fed. Rep. 839, 3 Am. B. R. 533; *In re* McCormick, 97 Fed. Rep. 566, 3 Am. B. R. 340; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770.

In re Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237, Judge Lowell, speaking on this subject, said: "Again, no precise quantitative weight is, in this district, assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are, in an important respect, better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the finding, or show just how strongly the court must incline against it in order to reverse it. To say that the findiing should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross,' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous, after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate."

If the order of the referee is modified or reversed the judge will usually direct the proper order to be entered with reference to the further proceedings. A certified copy of this order should be furnished the referee for his direction and guidance.[20]

§ 33. The administrative duties of referees.

In addition to his judicial duties, the statute enumerates certain administrative duties of the referee.

It provides,[1] that referees shall

First, declare dividends and prepare and deliver to trustees dividend sheets, showing the dividends declared and to whom payable;

Second, examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended.

Third, furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest. This does not include furnishing copies of proceedings pending before them.[2]

Fourth, give notices to creditors as provided by the statute;[3]

Fifth, make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by

[20] For forms of orders, see Forms Nos. 143 to 145, *post.*

[1] B. A. 1898, Sec. 39*a*.

[2] *In re* Lewin, 103 Fed. Rep. 850, 4 Am. B. R. 632.

[3] B. A. 1898, Sec. 58*a*, provides that "creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings."

either of the parties thereto, together with their findings therein, and transmit them to the judges;

Sixth, prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse or neglect to do so;[4]

Seventh, safely keep, perfect and transmit to the clerks the records herein required to be kept by them, when the cases are concluded;

Eighth, transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it is impracticable to transmit the original papers, transmit certified copies thereof by mail;

Ninth, upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance;[5] and

Tenth, whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

All notices are given by the referee, unless otherwise ordered by the judge.[6] In sending notices the referee is entitled to use an official penalty envelope, and need not pay postage.[7]

[4] See Gen. Ord. 9.

[5] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830; *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[6] B. A. 1898, Sec. 58*c*.

[7] Post Office Department, First Assistant Postmaster-General, Division of Correspondence, Washington, August 6, 1898.

Postmaster, Cincinnati, O., Sir:—

Your letter of August 1, addressed to the Assistant Attorney-General for the Post Office Department, has been referred to this office for reply. Answering your inquiry you are advised that a referee in bankruptcy, appointed by the Court in Bankruptcy, is entitled to make use of the official penalty envelope, for conducting the official business, for which he is appointed.

Very respectfully,

Geo. M. Allen, Acting First Assistant Postmaster-General.

A penalty envelope for conducting the official business by a referee may be in the following form:

JOHN DOE,	**DEPARTMENT OF JUSTICE.**
Referee in Bankruptcy,	**OFFICIAL BUSINESS.**
CINCINNATI O.	**Penalty for Private Use, $300.**

§ 34. Records of referees.

A record of proceedings in each case before a referee is required to be kept as nearly as may be in the same manner as records are now kept in equity cases in the circuit courts of the United States.[1]

The referee is required to endorse on each paper filed with him the date and the hour of filing and a brief statement of its character.[2] He must, upon application of any party in interest, preserve the evidence taken or the substance thereof, as agreed between the parties before him, when a stenographer is not in attendance.[3] If a stenographer is in attendance a transcript of his notes is used.[4] These papers, together with such orders as the referees from time to time makes, such notices as he is required to give and a record of the proceedings in each case required to be kept in a separate book or books, constitute the record of the case.[5]

[1] B. A. 1898, Sec. 42*a*.
[2] Gen. Ord. 2.
[3] B. A. 1898, Sec. 39, clause 9; Gen. Ord. 22.
[4] B. A. 1898, Sec. 38, clause 5; Gen. Ord. 22.
[5] B. A. 1898, Sec. 42*b*.

The record is frequently kept on one or more sheets of paper, upon which are stated the proceedings in the same form as proceedings are usually stated in an appearance docket. These separate sheets form the first pages of the record. The various sheets constituting the record should be firmly and neatly bound together, when the case is concluded, by the referee, should be certified by him and transmitted to the clerk of the court of bankruptcy, and there remains as a part of the record of the court.[6]

Whenever a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee he applies to the referee by petition that the question may be certified to the judge for review.[7] He is required thereupon to make up a record embodying the evidence or substance thereof, as agreed upon between the parties, together with his findings, certify to the same and transmit the record to the judge.[8]

He is also required to transmit to the clerk such papers as may be on file before him whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or if it be impracticable to transmit the original papers, transmit certified copies thereof by mail.[9] These last two are partial or interlocutory records, and do not affect the making of the final record above referred to at the proper time.

§ 35. Offenses of referees.

Referees are forbidden by the statute to act in cases in which they are directly or indirectly interested;[1] to practice as attorneys and examiners at law in any bankruptcy proceedings; or to purchase, directly or indirectly, any property of an estate in bankruptcy.

[6] B. A. 1898, Sec. 42*c*.

[7] Gen. Ord. 27. See *ante*, Sec. 32*a*.

[8] B. A. 1898, Sec. 39, clause 5; Gen. Ord. 27.

[9] B. A. 1898, Sec. 39, clause 8.

[1] Cobb v. Bray, 91 Fed. Rep. 102, 1 Am. B. R. 153; B. A. 1898, Sec. 39*b*.

The statute provides [2] that

"A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

"*first,* acted as a referee in a case in which he is directly or indirectly interested; or

"*second,* purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

"*third,* refused, while a referee, or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do."

§ 36. Compensation and expenses of referees.

The compensation is fixed by the statute [1] as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration, and from estates which have been administered before them one percentum commissions on all moneys disbursed to creditors by the trustee, or one-half of one percentum on the amount to be paid to creditors upon the confirmation of a composition."

Sec. 72, added by the amendment of 1903, provides "That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further

[2] B. A. 1898, Sec. 29*c*.

A circuit court or a court of bankruptcy has jurisdiction to punish for any of these offenses. B. A. 1898, Sec. 23*c* and Sec. 2, clause 4.

[1] B. A. 1898, Sec. 40, as amended Feb. 5, 1903; 32 Stat. at L. 797.

compensation for their services than that expressly authorized and prescribed in this act." [2]

The bankruptcy act as originally passed allowed referees ten dollars instead of fifteen dollars, and no fee for filing claims. Commissions were allowed on "sums to be paid out as dividends." This was held not to include commissions on moneys paid secured creditors, because they were not dividends.[3] This rule applies to all proceedings begun prior to February 5, 1903.[4] Under the provision of the amendment referees are clearly entitled to commissions on moneys paid secured creditors as well as on dividends to unsecured creditors.[5] But when a secured creditor resorts to a state court to enforce his security and the proceeds do not come into the possession of the bankruptcy court the referee is not entitled to commissions on such sums as may be paid the secured creditor.[6]

Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and the commissions therefor shall be divided between the referees.

In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

The compensation of referees prescribed by the act is in

[2] 32 Stat. at L. 797; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

But see *In re* Goldville Mining Co., 123 Fed. Rep. 579; 10 Am. B. R. 552.

[3] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559; *In re* Lumber Co., 116 Fed. Rep. 731; *In re* Ft. Wayne Elec. Corp., 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re* Gardner, 103 Fed. Rep. 922, 4 Am. B. R. 420; *In re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132. But see *In re* Barber, 97 Fed. Rep. 547, 3 Am. B. R. 306.

[4] Act of Feb. 5, 1903, Sec. 19; 32 Stat. at L. 797.

[5] *In re* Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414.

[6] *In re* Iowa Falls Mfg. Co., 140 Fed. Rep. 527, 15 Am. B. R. 384.

full compensation for all services performed by them under the act or under the general orders, but does not include expenses necessarily incurred by them in the performance of their duties under the act and allowed by special order of the judge.[7] Thus a referee will not be allowed any extra compensation for hearing specifications in opposition to a discharge,[8] or for preparing the dividend sheet, or for hearing the evidence during the examination,[9] or for hearing numerous claims for specific liens,[10] or for services in giving notice of application for discharge.[11] No allowance will be made for notices sent to creditors other than those required by Sec. 58 of the act, or for the employment of a stenographer in adjustment correspondence or other business of the estate.[12] Clerk hire will be allowed where the services of a clerk are necessary.[13] It has been held that where a trustee and adverse claimant to property try the right to it before the referee the referee is doing work in addition to his duty, and a reasonable fee as well as a stenographer's fee should be taxed against the unsuccessful claimant,[14] but it is doubtful if this would be allowed since the passage of Sec. 72 of the act.[15] The referee's claim for commissions must be presented to and passed upon by the court.[16] Every referee is required to keep an accurate account of his traveling and incidental expenses, and of those of any

[7] Gen. Ord. 35, par. 2. *In re* Daniels, 130 Fed. Rep. 597, 12 Am. B. R. 446.

[8] *In re* Troth, 104 Fed. Rep. 291, 4 Am. B. R. 780; Bragasa v. St. Louis Cycle (C. C. A. 5th Cir.), 107 Fed. Rep. 77, 5 Am. B. R. 700; *contra,* Fellows v. Frendenthal (C. C. A. 7th Cir.), 102 Fed. Rep. 731, 4 Am. B. R. 490; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510.

[9] *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132.

[10] *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; *In re* Barker, 111 Fed. Rep. 501, 7 Am. B. R. 132.

[11] *In re* Dixon, 114 Fed. Rep. 675, 8 Am. B. R. 145.

[12] *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651.

[13] Gen. Ord. 35; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Todd, 109 Fed. Rep. 265; 6 Am. B. R. 88.

[14] *In re* Todd, 109 Fed. Rep. 265; 6 Am. B. R. 88.

[15] 32 Stat. at L. 797.

[16] *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651.

clerk or other officer attending him in the performance of his duties in any case which may be referred to him and to make return of the same under oath to the judge, with proper vouchers, when vouchers can be procured, on the first Tuesday in each month.[17]

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the referee may require, from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for such expense.[19] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[18]

In any case in which the fees of the referee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.[19]

[17] Gen. Ord. 26.

[18] Gen. Ord. 10; B. A. 1898, Sec. 62.

[19] Gen. Ord. 35, par. 4.

CHAPTER VI.

CLERKS, MARSHALS AND ATTORNEYS.

§ 37. Duties of the clerk.

The word clerk, as used in the bankrupt act, means the clerk of a court of bankruptcy, unless such a meaning is inconsistent with the context.[1]

The clerk is required to keep a docket,[2] in which the cases shall be entered and numbered in the order in which they are commenced. It must contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case, except those duly entered on the referee's certified record aforesaid. The docket must be arranged in a manner convenient for reference, and shall at all times be open to public inspection. The clerk is also required to endorse on each paper filed with him the date and hour of filing and a brief statement of its character.[3] He issues all process, summons and subpœnas under the seal of the court.[4]

The clerks are also required to prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed;[5] and they are entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts;[6] pro-

[1] B. A. 1898, Sec. 1, clause 5.
[2] Gen. Ord. 1.
[3] Gen. Ord. 2.
[4] Gen. Ord. 3.
[5] Sec. 71, added by the amendment of 1903 to the Bankruptcy Act, 32 Stat. at L. 797.
[6] R. S. Sec. 828.

vided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

It is the duty of a clerk to refer a case to a referee if the judge is absent from the district or division of the district in which the petition is filed. In voluntary cases the reference is made immediately upon the filing of the petition.[7] In involuntary cases the reference is made on the next day after the last day on which pleadings may be filed, provided none have been filed by the bankrupt or any of his creditors.[8] For the purpose of enabling the referee to exercise the powers of the judge for the taking possession of and releasing the property of the bankrupt the clerk may issue a certificate showing the absence of the judge from the judicial district or division of the district, or his sickness or inability to act.[9]

The clerks are required to respectively [10]

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) collect the fees of the clerk, referee and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) and within ten days after each case has been closed

[7] B. A. 1898, Sec. 18*g*. Official Form No. 15, Form No. 32, *post*.

[8] B. A. 1898, Sec. 18*f*. Official Form No. 15, Form No. 32, *post*.

[9] B. A. 1898, Sec. 38, clause 3. That a deputy clerk can not refer a case, see Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. Rep. 102.

[10] B. A. 1898, Sec. 51.

pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

The clerk is entitled to one copy of the petition [11] and to a copy of the schedule.[12]

It is not the duty of a clerk of court to furnish referees with blank forms.[13]

§ 38. Compensation and expenses of clerks.

The clerk receives as full compensation for his service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.[1]

Such fee is in full compensation for all services performed by him in regard to filing petitions or other papers required by the act to be filed with him, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but does not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.[2] In any case in which the fees of the clerk are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[3]

The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under

[11] B. A. 1898, Sec. 59*c*.

[12] B. A. 1898, Sec. 7, clause 8.

[13] U. S. v. Mason (C. C. A. 1st Cir.), 129 Fed. Rep. 742.

[1] B. A. 1898, Sec. 52.

[2] Gen. Ord. 35, par. 1; *In re* Dunn Hardware & Furniture Co., 134 Fed. Rep. 997, 14 Am. B. R. 186, it was held that clerks are not entitled to a fee for mailing notice of application for discharge.

[3] Gen. Ord. 35, par. 4.

oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.[4] Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[5]

Clerks of courts of bankruptcy are not entitled to charge as expenses, money expended for printing blank forms for the use of referees.[6]

§ 39. Marshals.

The word "officer," as used in the act, including a marshal, and the imposing of duty upon or the forbidding of an act by any officer includes his successor and any person authorized by law to perform the duties of such officer.[1]

It is the duty of the marshal to serve such writs and process as may be directed to him. It is his duty to serve the bankrupt in involuntary proceedings with the writ of subpœna and a copy of the petition filed against him.[2] The judge may authorize him to seize and hold the property of the bankrupt subject to further orders,[3] or to conduct the business of the bankrupt for a limited period.[4] Notices are usually served by the referee, and not by the marshal.[5]

§ 40. Compensation and expenses of marshals.

Marshals respectively receive from the estate where an adjudication in bankruptcy is made, except as by the act other-

[4] B. A. 1898, Sec. 62.

[5] Gen. Ord. 10.

[6] U. S. v. Mason (C. C. A. 1st Cir.), 129 Fed. Rep. 742.

[1] B. A. 1898, Sec. 1, clause 18.

[2] B. A. 1898, Sec. 18*a*; Eq. Rule 13.

[3] B. A. 1898, Sec. 69*a*, and Sec. 2, clause 3.

[4] B. A. 1898, Sec. 2, clause 5; *In re* Adams Sartorial Co., 101 Fed. Rep. 215, 4 Am. B. R. 107.

[5] B. A. 1898, Sec. 58*c*.

wise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.[1] A marshal has been allowed a fee of $2 for serving a petition and affidavits and a fee of $2 for an order to show cause, both of which were served upon the same person.[2] In one case he was allowed $20 for seventeen days' services;[3] in another case $3 a day for services of a deputy marshal,[4] and in another case $2.50 a day for services of a deputy marshal and $1 a day for the services of a watchman.[5] In each case he was allowed his actual expenses in addition to his compensation. Actual expenses, however, do not include the cost of board and lodging.[6] The marshal must make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other and actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.[7]

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the marshal may require, from the bankrupt or other person in whose behalf the duty

[1] B. A. 1898, Sec. 52*b*; R. S. Sec. 829, provides for fees of marshals. The act of May 28, 1896, Sec. 6, 29 Stat. at L. 179, provides that all fees and emoluments of U. S. marshals shall be charged as heretofore.

[2] *In re* Damon, 104 Fed. Rep. 775, 5 Am. B. R. 133, Judge Hazel said: "Those charges, having always been made in accordance with custom and practice of United States courts, must, therefore, be regarded as reasonable. The charge for the one is fixed by statute, and the other by custom and tacit concurrence."

[3] *In re* Adams Sartorial Art Co., 101 Fed. Rep. 215, 4 Am. B. R. 107.

[4] *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692.

[5] *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625.

[6] *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625.

[7] Gen. Ord. 19; *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625.

is to be performed, indemnity for such expense.[8] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[8]

§ 41. Duty of the attorney-general to report annually.

The attorney-general is required annually to lay before Congress statistical tables showing for the whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property in the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.[1]

Officers, including clerks, marshals, receivers, referees and trustees,[2] are required to furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.[3]

§ 41a. Attorneys.

A court of bankruptcy has jurisdiction of a voluntary petition, signed and sworn to by the bankrupt, although the attorney for the bankrupt is not authorized to practice "in the circuit or district court." [1] An attorney for the bankrupt may act as notary to take the affidavit of the bankrupt to a petition and schedule prior to instituting proceedings in bankruptcy.[2] A petition in involuntary bankruptcy should be verified by the petitioner and specification in opposition to the discharge by objecting creditors. An attorney may verify either pleading

[8] Gen. Ord. 10.
[1] B. A. 1898, Sec. 53.
[2] B. A. 1898, Sec. 1, clause 18.
[3] B. A. 1898, Sec. 54.

[1] *In re* Kindt, 3 Am. B. R. 443, 98 Fed. Rep. 403.
[2] *In re* Kindt, 2 Am. B. R. 546, 98 Fed. Rep. 867.

if he is cognizant of the facts and can make positive oath to them.[3]

It has been held that an attorney may take the oath of his client to prove a debt,[4] but this is not good practice. The bankrupt's attorney should not represent creditors proving claims against the estate,[5] and it is not good practice for the same attorney to represent the trustee and the bankrupt.[6] The trustee may employ an attorney if necessary, but it has been held that the court will not make directions in advance with reference to such employment.[7] An attorney for creditors should not be appointed attorney for the trustee, where there are matters in controversy between different classes of creditors.[8] When an attorney accepts the office of trustee he can not also be attorney for creditors.[9] The creditors may elect an attorney for the trustee.[10]

An attorney, agent or proxy should be required to produce and file with the referee written authority from the creditor to represent him and vote at the creditors' meeting.[11] But an

[3] *In re* Herzikopf, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re* Hunt, 118 Fed. Rep. 282, 9 Am. B. R. 251; *In re* Chequassat Lumber Co., 112 Fed. Rep. 56, 7 Am. B. R. 87; *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391. But see *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63.

[4] *In re* Kimball, 4 Am. B. R. 144, 100 Fed. Rep. 777. But see *In re* Brumelkamp, 2 Am. B. R. 318, 95 Fed. Rep. 814.

[5] *In re* Kimball, 4 Am. B. R. 144, 100 Fed. Rep. 777; *In re* Wooten, 118 Fed. Rep. 670, 9 Am. B. R. 247. *In re* Cooper, 135 Fed. Rep. 196, an attorney whose retainer from bankrupt covered the filing of petition only, was permitted subsequently to represent creditors.

[6] Keyes v. McKirrow, 180 Mass. 261, 9 Am. B. R. 322.

[7] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[8] *In re* Rusch, 105 Fed. Rep. 607, 4 Am. B. R. 575; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[9] *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730.

[10] *In re* Little Lumber Co., 101 Fed. Rep. 558; 3 Am. B. R. 682. But see *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[11] *In re* Blankfein & Deitz, 2 N. B. N. 49; *In re* Sugenheimer, 91 Fed. Rep. 744, 1 Am. B. R. 425; *In re* Eagles & Crisp, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631. But see *In re* Gasser (C. C. A. 8th Cir.), 104 Fed. Rep. 537, 5 Am. B. R. 32.

attorney at law admitted to practice in the district or circuit court may appear in bankruptcy proceedings generally in behalf of his client without written power of attorney as in other cases.[12] Notices of hearing before a referee may be given by mail to the attorneys interested.[13]

If an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he can not be held in contempt for error in judgment.[14]

Fees of Attorneys.—The bankrupt act provides that the costs of administration, to which priority is given, shall include one reasonable attorney's fee, for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties prescribed in the act, and to the bankrupt in voluntary cases, as the court may allow.[15] This allowance may be made by the referee,[16] and may be made *ex parte* without giving notice to creditors.[17] Where a partnership is adjudged a bankrupt, but one attorney's fee can be allowed, though each of the partners appeared throughout the proceedings by different attorneys.[18] Where two bankruptcy proceedings are filed by attorneys representing different creditors and thereafter consolidated by order of court, a single attorney's fee will be allowed for such attorneys.[19]

Before a fee will be allowed to an attorney for a voluntary bankrupt he must show that he actually rendered some services.[20] Where the referee is not satisfied with the evidence

[12] *In re* Gasser (C. C. A. 8th Cir.), 104 Fed. Rep. 537, 5 Am. B. R. 32.

[13] *In re* Lewin, 103 Fed. Rep. 850, 4 Am. B. R. 632.

[14] *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113.

[15] B. A. 1898, Sec. 64*b*, cl. 3.

[16] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146.

[17] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641.

[18] *In re* Eschwege & Cohn, 8 Am. B. R. 282.

[19] *In re* McCracken & McLeod, 129 Fed. Rep. 621, 12 Am. B. R. 95.

[20] *In re* Terrill, 103 Fed. Rep. 781, 4 Am. B. R. 625

of services rendered, he may suspend the claim for a time, but must make an allowance within a reasonable time on such evidence as he may have.[21]

It has been held that the attorney for a voluntary bankrupt is entitled to a fee only for services which are beneficial to the estate, and that no fee should be granted for services rendered in preparing the schedules or other services for the benefit of the bankrupt.[22] This doctrine is dissented from by Judge Brown.[23] Claims for such fees may be proved against the estate under general order ten.[24] A fee for such services and for all other services in assisting the bankrupt in performing the duties required of him by the act has been allowed the attorney of an involuntary bankrupt.[25] Where a voluntary bankrupt before filing his petition paid his attorney a fee for services in preparing the schedules and petition he can not recover this and the filing fee from the estate under general order ten.[26] A fee has been refused where the bankrupt's attorney received from the bankrupt's brother a larger fee than would ordinarily be allowed by the court out of the estate.[27] An attorney for the bankrupt is not entitled to a fee as a matter of right. Its allowance is within the sound discretion of the court,[28] as is also its amount,[29] and this discretion may be reviewed on appeal.[30] The fee allowed should be, not

[21] *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146.

[22] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535; *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

[23] *In re* Kross, 96 Fed. Rep. 816, 3 Am. B. R. 188.

[24] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535.

[25] *In re* Michel, 95 Fed. Rep. 803, 1 Am. B. R. 665; *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238; *In re* Goldville Mfg. Co., 123 Fed. Rep. 579, 10 Am. B. R. 552.

[26] *In re* Matthews, 97 Fed. Rep. 772, 3 Am. B. R. 265.

[27] *In re* O'Connell, 98 Fed. Rep. 83, 3 Am. B. R. 422.

[28] *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58; *In re* Morris, 125 Fed. Rep. 841, 11 Am. B. R. 145.

[29] *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535; *In re* Burrus, 97 Fed. Rep. 926, 3 Am. B. R. 296; *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238.

[30] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17.

what is reasonable for the work done, but what is reasonable for the work necessary.[31] To justify an allowance of a fee, the services must have been rendered in good faith and reasonably necessary for the purpose of the act.[32] Where the bankrupt tries to defeat and delay the proceedings no fee should be allowed to his attorney,[33] nor should any fee be allowed for defending him for contempt.[34] It has been held that a fee should not be allowed for assisting a bankrupt in getting his discharge.[35]

An attorney who represents the creditors in voluntary proceedings is not entitled to fees out of the estate.[36] An attorney for the creditors in involuntary proceedings is entitled to a reasonable fee as a matter of right.[37] An attorney for the petitioning creditors is not entitled to a fee for attending creditors' meetings, or for doing the work which the bankrupt act requires the referee to do.[38] Where a creditor employs an attorney the attorney has a lien on the amount secured for the creditor which the bankruptcy court will enforce.[39]

A fee is also allowed to the attorney of the trustee in both involuntary and voluntary cases when his services are reasonably necessary.[40] The trustee must himself decide whether such services are reasonably necessary as the court will not instruct him as to whether or not he should employ an attor-

[31] *In re* Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

[32] *In re* Rosenthal & Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[33] *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692.

[34] *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238. But see language in *In re* Rosenthal & Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[35] *In re* Brundin, 112 Fed. Rep. 306, 7 Am. B. R. 296. But see *In re* Rosenthal & Lehman, 120 Fed. Rep. 848, 9 Am. B. R. 626.

[36] *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

[37] *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 785, 4 Am. B. R. 17; Smith v. Cooper, 120 Fed. Rep. 230, 9 Am. B. R. 755.

[38] *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 219.

[39] *In re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319.

[40] *In re* Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682; *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847. But see *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559; *In re* Lang, 127 Fed. Rep. 755, 11 Am. B. R. 794; *In re* McKenna, 137 Fed. Rep. 611, 15 Am. B. R. 4.

[41] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575.

ney.[41] A fee will not be allowed where there was no reasonable expectation that the work of an attorney would gain anything for the estate.[42] A trustee who is an attorney at law will not be allowed extra compensation for his professional services.[43] The attorney for a trustee is not entitled to a fee for professional services for attending examinations where his services were rendered in behalf of creditors who were his real clients,[44] or in general when the attorney for the trustee is also attorney for the creditors.[45] An attorney must disclose his dealings with his client to enable the court to fix the amount of his compensation.[46] An attorney for an assignee under a general assignment for creditors in a state court, where the property of the debtor is later administered in bankruptcy, is entitled to a reasonable fee for services rendered such assignee before and after the petition in bankruptcy is filed, which are beneficial to the estate,[47] but he is not entitled to a fee for resisting bankruptcy proceedings.[48] Fees for services rendered the assignee which are beneficial to the estate should be given priority under Sec. 64*b*.[49] A fee for services rendered the debtor in preparing the deed of assignment may be proved as an unsecured claim.[50]

The attorney for creditors, who have obtained liens on property which the trustee could not otherwise reach, may be allowed a reasonable fee.[51]

But see *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[42] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830.

[43] *In re* Byerly, 128 Fed. Rep. 637, 12 Am. B. R. 186; *In re* George Halbert Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 236, 13 Am. B. R. 399; *In re* Felson, 139 Fed. Rep. 275, 15 Am. B. R. 185.

[44] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830.

[45] *In re* Carolina Cooperage Co., 96 Fed. Rep. 920, 3 Am. B. R. 154.

[46] *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

[47] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[48] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[49] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1. See also *In re* Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 13 Am. B. R. 677; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 10 Am. B. R. 254.

[50] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[51] In Receivers, etc., v. Staake (C. C. A. 4th Cir.), 133 Fed. Rep. 717, 13 Am. B. R. 281, affirmed, 202

The amount of fees to be allowed an attorney for services in bankruptcy rests in the discretion of the court. The policy of the bankrupt act is to have the estate of the bankrupt administered as economically as possible, but this does not imply that an attorney shall be required to render services in bankruptcy for less compensation than in other cases. The court should not permit the estate to be burdened with unnecessary attorney's fees, but an attorney is entitled to a reasonable fee commensurate with the actual services rendered. An attorney for a trustee or creditors, who succeeds in recovering property concealed or transferred in fraud of creditors, is entitled to the same compensation as would be allowed for like services in other cases. The amount of fees allowed attorneys in various cases are collated below.[52]

U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

"The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors, and whose proceedings produced the fund which now is to pass to the trustee of the bankrupt. The attaching creditors, in good faith, and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure, and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee. The equity of the claim for compensation to be paid out of the fund is very strong. It is clearly a case in which, by an appropriation which the bankrupt law makes of a fund which came into existence and was preserved by the legal proceedings instituted by the attaching creditors, all the common creditors, without distinction, are benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors. The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should, in its discretion, allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits. Trustees v. Greenough, 105 U. S. 527-534, 26 L. Ed. 1157."

[52] Under different circumstances the following amounts have been allowed as reasonable fees: To attorney for a voluntary bankrupt,

A court of bankruptcy will not ordinarily tax as costs attorneys' fees upon the dismissal of a petition in involuntary bankruptcy.[53] When, however, an application to seize and hold the property of the bankrupt pending the hearing has been granted and the petition afterwards dismissed, the court may allow attorneys' fees as costs of the proceeding.[54] A docket fee of twenty dollars may be taxed as costs in a proper case.[55] A court of bankruptcy has refused to dismiss a voluntary petition until the attorney for the trustee has been paid.[56] The court will not enforce a provision in a mortgage for the payment "of an attorney's fee of ten per cent of the amount of the debt." [57]

PAYMENT OF ATTORNEYS' FEES IN CONTEMPLATION OF BANKRUPTCY.—The statute provides: "If a debtor shall,

diem, *In re* Mayer, 101 Fed. Rep. 695, 4 Am. B. R. 238; ninety dollars, *In re* Anderson, 103 Fed. Rep. 854, 4 Am. B. R. 640; one hundred and twenty-five dollars, *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58; one hundred dollars, *In re* Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

To the attorney for creditors: one hundred dollars (for preparing the petition, schedules, etc. This is governed in some districts by rule of court), *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 219; seventy-five dollars, *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692; two thousand dollars, *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; seventy-five dollars, *In re* Silverman, 97 Fed. Rep. 325, 3 Am. B. R. 227; *In re* Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682; one hundred and fifty dollars, *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58; one thousand dollars, Smith v. Cooper, 120 Fed. Rep. 230, 9 Am. B. R. 755. In Davidson v. Friedman, 140 Fed. Rep. 853, 15 Am. B. R. 489, $2,500 was allowed the attorney for creditors for recovering $16,000 for the estate; and in Rogers v. Page, 149 Fed. Rep. ——, 17 Am. B. R. ——, $15,000 was allowed the attorney for creditors for recovering $70,000 for the estate.

To attorney for trustee: one hundred and twenty-five dollars, *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; twenty dollars, *In re* Mitchell, 1 Am. B. R. 687; twenty-five dollars, *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847.

[53] *In re* Ghiglione, 93 Fed. Rep 186, 1 Am. B. R. 580; *In re* Phila. & Lewes Transp. Co., 127 Fed. Rep. 896, 11 Am. B. R. 444; *In re* Morris, 115 Fed. Rep. 591, 7 Am. B. R. 709.

[54] *In re* Abraham (C. C. A. 5th Cir.), 93 Fed. Rep. 767, 2 Am. B. R. 266.

[55] *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[56] *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847.

[57] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369.

directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." [58] This provision relates to security for or the payment of attorneys' fees for services to be performed before bankruptcy.[59] Payment for services rendered after bankruptcy proceedings are commenced is provided by Section 64*b* of the act. It has been held that the character of services referred to in Section 60*d* are only such as tend to conserve and benefit the estate of the bankrupt.[60] The promise by a debtor to transfer certain property to his attorney in contemplation of bankruptcy where there was no actual delivery or change of possession until after adjudication upon the petition does not constitute a transfer to secure the payment of attorney's fees.[61]

When an attorney's fee is scheduled as a debt, it will not be given priority of payment, but must be proved like any other unsecured debt.[62] The petition by the trustee to re-examine a

fifty dollars, *In re* Beck, 92 Fed. Rep. 889, 1 Am. B. R. 535; fifty dollars, *In re* Kross, 96 Fed. Rep. 816, 3 Am. B. R. 188; two hundred dollars, *In re* Burrus, 97 Fed. Rep. 926, 3 Am. B. R. 296; fifty dollars, *In re* Smith, 108 Fed. Rep. 39, 5 Am. B. R. 559.

To attorney for involuntary bankrupt: twenty-five dollars, *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; fifty dollars, and twenty-five dollars per

[58] B. A. 1898, Sec. 60*d*. Pratt v. Bothe (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 12 Am. B. R. 529.

[59] Pratt v. Bothe (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 12 Am. B. R. 529; Furth v. Stahl, 205 Pa. 439, 10 Am. B. R. 442; Swartz v Frank, 183 Mo. 438.

But see observation of Judge Brown *In re* Kross, 96 Fed. Rep. 816, 3 Am. B. R. 188, and *In re* Habegger (C. C. A. 8th Cir.), 139 Fed. Rep. 623, 15 Am. B. R. 198.

[60] *In re* Habegger (C. C. A. 8th Cir.), 139 Fed. Rep. 623, 15 Am. B. R. 198.

[61] *In re* Corbett, 104 Fed. Rep. 872, 5 Am. B. R. 224.

[62] *In re* Morris, 125 Fed. Rep. 841, 11 Am. B. R. 145.

transaction between the bankrupt and his attorney under this section is administrative in character, of which the court of bankruptcy has jurisdiction irrespective of Section 23 of the act.[63]

[63] *In re* Lewin, 103 Fed. Rep. 850, 4 Am. B. R. 632.

CHAPTER VII.

WHO MAY BE BANKRUPTS.

§ 42. Voluntary bankrupts.

Any person who owes debts, except a corporation, is entitled to the benefits of the act as a voluntary bankrupt.[1]

The language of this provision is very general and comprehensive. A person is defined by the act itself to include partnerships and women.[2] It would therefore appear that any natural person or association of persons not incorporated, irrespective of trade, business or profession, may become voluntary bankrupts. The only condition is that such persons shall owe debts which a discharge in bankruptcy would release. A person whose only liability is a judgment on which an appeal is pending[3] or a judgment for willful and malicious injury[4] can not become a voluntary bankrupt. A creditor can not resist voluntary bankruptcy on the ground that the petitioner is solvent.[5] No limit is fixed as to the amount of the indebtedness.[6] The right of an alien, an infant, a lunatic and a married woman to become voluntary bankrupts is considered in another place.[7]

§ 43. Involuntary bankrupts.

The act, as amended Feb. 5, 1903, provides[1] that "any natural person, except a wage-earner, or a person engaged

[1] B. A. 1898, Sec. 4*a*.

[2] B. A. 1898, Sec. 1, clause 19.

[3] *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

[4] *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

[5] *In re* Carleton, 115 Fed. Rep 246, 8 Am. B. R. 270.

[6] Under the act of 1867, R. S. Sec. 5014, a person was required to owe debts, provable in bankruptcy, exceeding the sum of $300.

[7] See Secs. 44 to 47, *post*.

chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

It will be observed that the provision with respect to persons against whom a petition may be filed is more limited in its scope than in the case of a person voluntarily seeking the benefits of the act. It is limited, *first*, to natural persons, not wage-earners or persons engaged chiefly in farming or the tillage of the soil;[2] second, to unincorporated companies;[3] *third*, to corporations engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, and, *fourth*, to private bankers. A trustee in bankruptcy, like any other person, may be adjudged a bankrupt.[4] In any case there must be an indebtedness of $1,000 or over in order to support a petition in involuntary bankruptcy.[5]

The statute expressly excludes, *first*, wage-earners, and defines a wage-earner to mean "an individual who works for wages, salary or hire at a rate of compensation not exceeding $1,500 per year."[6] A bookkeeper and secretary of a corporation whose salary is less than $1,500 per year is within this

[1] B. A. 1898, Sec. 4*b*, 32 Stat. at L. 797.

[2] An involuntary petition against a natural person is defective which does not aver that the defendant is not a wage earner or a person engaged chiefly in farming or the tillage of the soil. *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515. Such defect may be cured by amendment. Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762; and it is waived by answering on the merits. Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[3] See also B. A. 1898, Sec. 5.

[4] See Merrick's Estate, 5 Watts & S. (Penn.) 9.

[5] B. A. 1898, Sec. 4*b*.

[6] B. A. 1898, Sec. 1, clause 27.

clause.[7] So also a man, who owns a team, wagons and plow, with which he works by the day for different employers.[8] *Second,* persons engaged chiefly in farming and the tillage of the soil.[9] For a person's principal occupation to be farming it must be that which is of principal concern to him, which he deems of paramount importance to his welfare and on which he chiefly relies for his livelihood.[10] The owner of a farm who has leased it to another for a year is not a person engaged chiefly in farming and can be made an involuntary bankrupt.[11] *Third,* national banks, which are wound up when insolvent by special statute are not included in the bankruptcy act;[12] *fourth,* banks incorporated under state or territorial laws, whose affairs, if involved, may be settled under the laws of the state or territory creating them.[13] A corporation can not be a private banker within the meaning of the bankrupt act.[14] The bankrupt statute does not authorize or justify an

[7] *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 244.

[8] *In re* Yoder, 127 Fed. Rep. 894; 11 Am. B. R. 445.

[9] *In re* Thompson, 102 Fed. Rep. 287, 4 Am. B. R. 340; Wulbern v. Drake (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 9 Am. B. R. 695 affirming 114 Fed. Rep. 229.

In re Luckhardt, 101 Fed. Rep. 807, 4 Am. B. R. 307, a merchant who had committed an act of bankruptcy and thereafter abandoned his business and engaged in farming was adjudged an involuntary bankrupt. See also Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162.

[10] *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577. *In re* Drake, 114 Fed. Rep. 229, 8 Am. B. R. 137, affirmed in Wulbern v. Drake (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 9 Am. B. R. 695; Bank of Dearborn v. Matney, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re* Brown, 132 Fed. Rep. 706, 13 Am. B. R. 140; Couts v. Townsend, 126 Fed. Rep. 249, 11 Am. B. R. 126; *In re* Hoy, 137 Fed. Rep. 175, 14 Am. B. R. 648.

[11] *In re* Matson, 123 Fed. Rep. 743, 10 Am. B. R. 473.

[12] R. S. Secs. 5220 to 5243; see *In re* Manufacturer's National Bank, No. 9051, Fed. Cas., s. c. 5 Biss. 499.

[13] Davis v. Stevens, 104 Fed. 235, 4 Am. B. R. 763. The rule seems to have been otherwise under the act of 1867. See Thornhill v. Bank of Louisville, No. 13990, Fed. Cas., s. c. 3 N. B. R. 435.

[14] *In re* Surety Guarantee & Trust Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129. In Burkhart v. German American Bank, 137 Fed. Rep. 958, 14 Am. B. R. 222, an Ohio joint stock banking association was held to be a partnership and therefore subject to be adjudged bankrupts. See also same

adjudication in bankruptcy against the individual estate of a deceased person.[15] The act deals with living persons. A deceased person can not be adjudged a bankrupt.

It has been held that whether a person is a farmer or a wage-earner, and therefore not subject to be adjudged an involuntary bankrupt, is to be determined by his vocation at the date of the act of bankruptcy complained of and not at the time of filing the petition.[16]

The right to force an alien, an infant, a lunatic and a married woman into involuntary bankruptcy is considered in another place.[17]

§ 44. Aliens.

The act does not limit the person who may be adjudged bankrupts to citizens or even to residents of the United States. Hence an alien may become either a voluntary or an involuntary bankrupt.[1]

A foreigner must either have had a principal place of business or residence within the United States for six months, or the greater portion thereof, or have property within the juris-

case in appellate court, Dickas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

[15] Adams v. Terrell, 4 Fed. Rep. 802; *In re* Stevens, No. 13393, Fed. Cas., s. c. 1 Low. 397; *In re* Daggett, No. 3536, Fed. Cas., s. c. 8 N. B. R. 433. In these cases the question arose with reference to reaching the assets of a deceased person.

[16] Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, (Application for writ of certiorari was denied by the supreme court of U. S. December 10, 1906.); *In re* Luckhardt, 101 Fed. Rep. 807, 4 Am. B. R. 307; *In re* Mackey, 110 Fed. Rep. 361, 6 Am. B. R. 577.

See also Tiffany v. La Plume Condensed Milk Co., 141 Fed. Rep. 444, 15 Am. B. R. 413, where the English and American cases on this subject are reviewed.

[17] See Secs. 44 to 47, *post*.

[1] *In re* Goodfellow, No. 5536, Fed. Cas., s. c. 1 Low. 510; *In re* Boynton, 10 Fed. Rep. 277.

In Judd v. Lawrence, 1 Cush. (Mass.) 531, it was held that a foreigner residing within the commonwealth could take the benefit of the state insolvent law.

In Cutter v. Folsom, 17 N. H. 139, under the bankrupt act of August 19, 1841, 5 Stat. at L. 440, it was held that one residing within the jurisdiction of the circuit court, who was a member of a foreign firm, was entitled to the provisions of the act.

diction of the court of bankruptcy.[2] "The governing principle," said Judge Brett,[3] "is that all legislation is *prima facie* territorial; that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being themselves within the allegiance of the legislating power." Hence it may be doubted if a foreigner would be adjudged a bankrupt unless he had assets or owed debts contracted in the United States.[4] Such would be an idle proceeding.

§ 45. Infants.

An infant is not generally liable for debt contracted by him during his infancy.[1] The word infant, or minor, is not found in the bankrupt act. In order to support a bankruptcy petition there must be capacity in the infant to owe the debt.[2] But

[2] B. A. 1898, Sec. 2, clause 1.

[3] *Ex parte* Blain, 12 Chan. Div. 528.

[4] Consult *ex parte* Blain, 12 Chan. Div. 522.

[1] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232, in discussing the rights of an infant to be adjudged a bankrupt, Judge Blatchford said: "The general contracts of an infant having no force, if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority." . . . .

"But there are other difficulties attendant on an involuntary case. The debt of a petitioning creditor must be a debt provable at the time the petition is filed." He then proceeds to show that such a debt is not provable under the different sections of the act of 1867, which reasons are applicable with equal force to the act of 1898.

See also Belton v. Hodges, 9 Bing. 365, where it was held that a commission of bankrupt against an infant was void, not merely voidable.

[2] *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Dunnigan, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607; *In re* Eidemiller, 105 Fed. Rep. 595, 5 Am. B. R. 570.

See *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232; *In re* Book, No. 1637, Fed. Cas., s. c. 3 McLean 317, where an infant was allowed to claim the benefit of the bankrupt law of 1841; *In re* Cotton, No. 3269, Fed. Cas., s. c. 6 Law. Rep. 546, the petitioner who applied for an injunction was a minor, and this was one of the objections to his seeking the benefit of the act. The court passed the question without deciding it.

whether a debt for necessities would support a bankruptcy petition seems to be an open question in England.[3] After an infant has reached his majority he may become liable for a debt created during infancy. If he does become so liable he is subject to be adjudged a bankrupt.

§ 46. Lunatics.

Whether a lunatic can be adjudged either a voluntary or involuntary bankrupt is doubtful under the authorities.

In England the words of the statute are "a debtor," [1] which may be considered equivalent to "any person who owes debts" or "owing debts." [2] Under the English statutes it is an open question, and has been since the time of Lord Eldon.[3] It has been held that a person, who is so unsound in mind as to be wholly incapable of managing his affairs, can not, in that condition, commit an act for which he can be forced into bankruptcy by his creditors against the objection of his guardian.[4] It has also been held that an insane person can not become a voluntary bankrupt because he is not a "qualified" person within the meaning of Sec. 59*a*.[5] But if he commits an act of bankruptcy while sane he has been adjudged an involuntary bankrupt against the consent of his guardian.[6] The fact that a person has been adjudged a lunatic does not imply that he will always remain so.[7] A guardian *ad litem* may be appointed pending the determination of his sanity at the time the act of bankruptcy complained of was committed.[8]

[3] *In re* Soltykoff, 1 Q. B. (1891) 415.

[1] 46 and 47 Vic. chap. 52, Sec. 4.

[2] B. A. 1898, Sec. 4 *a* and *b*.

[3] *In re* Farham, 2 Chan. Div. (1895) 805.

[4] *In re* Funk, 101 Fed. Rep. 244, 4 Am. B. R. 96; *In re* Marvin, No. 9178, Fed. Cas., s. c. 1 Dill. 178; *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96.

[5] *In re* Eisenberg, 117 Fed. Rep. 786, 8 Am. B. R. 551.

[6] *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96; *Ex parte* Stamp, 1 De Gex, 345; Anon. 13 Ves. 590.

[7] Saunders v. Mitchell, 61 Miss. 321.

[8] *In re* Burka, 107 Fed. Rep. 674, 6 Am. B. R. 843.

Where a bankrupt becomes insane after the commencement of proceedings in bankruptcy they are not abated thereby, but may be conducted and concluded in the same manner, so far as possible, as though he had not become insane.[9]

A partnership may be adjudged a bankrupt after the insanity of a partner and the appointment of a conservator of his estate.[10]

§ 47. Married women.

Under the former bankrupt acts there was some doubt as to the power of the courts of bankruptcy to adjudge a married woman a bankrupt.[1] The laws of the several states have extended a married woman's rights with reference to property within the last quarter of the century.

In order to come within the provisions of the bankrupt act a person must owe a debt. The true rule with reference to married women is that where a woman may owe a debt she may be adjudged a voluntary or involuntary bankrupt.[2] Her capacity to owe is determined by the laws of the state of her domicile, as interpreted by the highest court in the state.[2] She may be able to contract and owe debts and accordingly be adjudged a bankrupt in one state and not in another state.

§ 48. Corporations.

As the bankrupt act does not restrict the classes of unincorporated companies or partnerships, it may become important to determine what is a corporation. Corporations are defined

[9] B. A. 1898, Sec. 8.

[10] *In re* Stein & Co. (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 11 Am. B. R. 536.

[1] The cases are collected and considered in an article on married women as bankrupts, 13 American Law Register, N. S. (March, 1874) 129.

[2] MacDonald v. Tefft-Welter Co. (C. C. A. 5th Cir.), 128 Fed. Rep. 381, 11 Am. B. R. 800; *In re* Collins, No. 3006, Fed. Cas., s. c. 3 Biss. 415; *In re* O'Brien, No. 10397, Fed. Cas., s. c. 1 N. B. R. 176; *In re* Lyons, No. 8649, Fed. Cas., s. c. 2 Saw. 524, and note discussing the subject. *In re* Kinkead, No. 7824, Fed. Cas., s. c. 3 Biss. 405 and note; *In re* Goodman, No. 5540, Fed. Cas., s. c. 5 Biss. 401; *In re* Howland, No. 6791, Fed. Cas., s. c. 2 N. B. R. 357.

by the act to mean "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association." [1]

The present bankrupt act is narrower in its application to corporations than the act of 1867. The older act applied to all "moneyed, business or commercial corporations." [2] The present act, as amended, limits the classes of corporations subject to be adjudged bankrupt upon a petition by creditors, to those "principally engaged in manufacturing, trading, printing, publishing, mining or mercantile pursuits." [3] It is necessary to allege in the petition that the corporation is engaged in one of these pursuits or the courts acquires no jurisdiction to adjudge it a bankrupt.[4]

When a corporation falls within one of the enumerated classes and has committed an act of bankruptcy, although proceedings for dissolution had been begun before the filing of the petition,[5] or it had ceased to do business,[6] it should be adjudicated a bankrupt in order that its property may be administered in bankruptcy. A decree dissolving a corporation after an adjudication has no effect on the bankruptcy proceedings.[7]

Any corporation not falling within one of the enumerated classes is not subject to be adjudged a bankrupt in an involun-

[1] B. A. 1898, Sec. 1, clause 6: *In re* Seaboard Fire Underwriters, 137 Fed. Rep. 987, 13 Am. B. R. 722; *In re* Hercules Atkin Co., 133 Fed. Rep. 813, 13 Am. B. R. 369.

In Burkhart v. German American Bank, 137 Fed. Rep. 958, 14 Am. B. R. 222, an Ohio joint stock banking association was held to be a partnership and not a corporation within the meaning of the bankrupt act.

[2] R. S. Sec. 5122.

[3] B. A. 1898, Sec. 4*b*, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

[4] *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[5] Scheurer v. Smith, etc., Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

[6] Tiffany v. LaPlume Condensed Milk Co., 141 Fed. Rep. 444, 15 Am. B. R. 413; *In re* Moench (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 12 Am. B. R. 240.

[7] *In re* White Mountain Paper Co., 127 Fed. Rep. 180, 11 Am. B. R. 491.

tary proceeding. A corporation which has not in fact engaged in one of these pursuits, although its charter authorized it to do so, can not be adjudged an involuntary bankrupt.[8] But the fact that it has ceased to do business is not sufficient to prevent an adjudication.[9] A corporation has been held not to be subject to adjudication which was engaged in farming,[10] or in furnishing water for irrigation,[11] or a common carrier "extensively engaged" in trading,[12] or a mercantile agency,[13] or a laundry,[14] or a social club,[15] or a public circulating library,[16] or a theatrical company,[17] or a building and loan association.[18]

MANUFACTURING COMPANIES.—As generally understood and defined by the lexicographers, a manufacturing company is one engaged in making goods or wares of any kind; producing articles for use from raw or prepared materials by giving to these materials new qualities, properties or combinations, whether by hand labor or by machinery.[19] This is probably the meaning of the word as used in the bankrupt act.

[8] *In re* N. Y. & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508, affirmed *In re* Morris (C. C. A. 2d Cir.), 102 Fed. Rep. 1004; *In re* Tontine Surety Co., 116 Fed. Rep. 401, 8 Am. B. R. 421.

[9] Tiffany v. LaPlume Condensed Milk Co., 141 Fed. Rep. 444, 15 Am. B. R. 413; *In re* Moench (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 12 Am. B. R. 240.

[10] *In re* Lake Jackson Sugar Co., 129 Fed. Rep. 640, 11 Am. B. R. 458.

[11] *In re* Bay City Irrigation Co., 135 Fed. Rep. 850, 14 Am. B. R. 370.

[12] Philpot v. O'Brion, 126 Fed. Rep. 167, 11 Am. B. R. 205.

[13] Zugalla v. International Mercantile Agency (C. C. A. 3d Cir.), 142 Fed. Rep. 927, 16 Am. B. R. 67.

But see *In re* Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607.

[14] *In re* White Star Laundry, 117 Fed. Rep. 570, 9 Am. B. R. 30.

[15] *In re* Fulton Club, 113 Fed. Rep. 997, 7 Am. B. R. 670.

[16] *In re* Parmelee (C. C. A. 7th Cir.), 120 Fed. Rep. 235, 9 Am. B. R. 568.

[17] *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219.

[18] *In re* N. Y. Building, Loan Banking Co., 127 Fed. Rep. 471, 11 Am. B. R. 51.

[19] See *In re* Tecopa Mining & Smelting Co., 110 Fed. Rep. 120, 6 Am. B. R. 250.

In Columbia Iron Works v. Nat. Lead Co., 127 Fed. Rep. 99, 11 Am. B. R. 340, Judge Severens, speaking for the circuit court of appeals for the 6th circuit, said: "The business in question is the building of articles of commerce, as much as the building of locomotives and rail-

A corporation has been held to be a manufacturing company within this provision which was engaged in the construction of bridges and buildings by contract,[20] or building ships,[21] or buying and selling ice.[22]

TRADING COMPANIES.—A trading company is one whose business is buying or selling or barter, its object being to buy and sell again personal property for gain. What constitutes a trader under the bankrupt law has been the subject of judicial interpretation, both in this country and in England.[23] Thus the term trader has been held to include a miller,[24] a baker,[25] a butcher,[26] a stair-builder,[27] a furniture dealer,[28] a grocer,[29] a merchant tailor,[30] a theatrical manager,[31] but not a theatrical corporation,[32] a livery-stable keeper,[33] a druggist or

way cars, or the manufacture of their constituent parts. The distinction would seem to run along the line of those articles which are more or less fixed in place, and not ordinarily the subjects of bargain and sales as articles of commerce, as contradistinguished from those which are movable and ordinarily regarded as subjects of sale and manual transfer, articles of trade in the common course of mercantile business. The associated words seem to import that Congress intended to include all those corporations which were engaged in the manufacture or sale of articles of commerce."

[20] *In re* Niagara Contracting Co., 127 Fed. Rep. 782, 11 Am. B. R. 643.

But see *In re* MacNichol Const. Co., 134 Fed. Rep. 979, 14 Am. B. R. 188, affirmed (C. C. A. 4th Cir.), 140 Fed. Rep. 840, 15 Am. B. R. 515.

[21] *In re* Marine Const. & Dry Dock Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 446, 11 Am. B. R. 640; Columbia Iron Wks. v. Nat. Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. 340.

[22] First Nat. Bank v. Wyoming Ice Co., 136 Fed. Rep. 466, 14 Am. B. R. 448.

But see *In re* N. Y. & N. J. Ice Lines (C. C. A. 2d Cir.), 147 Fed. Rep. 214.

[23] *In re* Eeles, No. 4302, Fed. Cas., s. c. 5 Law Rep. 273; Wakeman v. Hoyt, No. 17051, Fed. Cas., s. c. 5 Law Rep. 309, and cases cited in notes below.

[24] Daniels v. Palmer, 35 Minn. 347.

[25] *In re* Cocks, No. 2933 Fed. Cas., s. c. 3 Ben. 260.

[26] *In re* Bassett, 8 Fed. Rep. 266; Dally v. Smith, 4 Burr 2148; Sylvester v. Edgecomb, 76 Me. 499.

[27] *In re* Garrison, No. 5254, Fed. Cas., s. c. 5 Ben. 430.

[28] *In re* Newman, No. 10175, Fed. Cas., s. c. 3 Ben. 20.

[29] *In re* Good, 78 Cal. 399.

[30] Archenbrown, No. 505, Fed. Cas., s. c. 12 N. B. R. 17.

[31] *In re* Duff, 4 Fed. Rep. 519.

[32] *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219.

[33] Groves v. Kilgore, 72 Me. 489;

a physician who dispenses and is paid for medicines administered to his own patients,[34] a smuggler or illegal trader,[35] or an electric light company whose principal business was furnishing electricity for power and light.[36]

On the other hand, the term trader has been held not to include a stock broker,[37] or a building association,[38] or railroad contractor,[39] or a mining company,[40] or a superintendent of a common carrier,[41] or a carrier,[42] or a teamster who buys and sells hay and straw for the purpose of keeping his teams,[43] or a fisherman who occasionally buys fish to make up for market a cargo otherwise deficient,[44] or a person who from

In re Odell, No. 10426, Fed. Cas., s. c. 9 Ben. 209; Wright v. Bird, 1 Price 20; Martin v. Nightingale, 3 Bing. 421; *In re* Morton Boarding Stables, 108 Fed. Rep. 791, 5 Am. B. R. 763. This case is, however, disapproved *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; and *In re* U. S. Hotel Co. (C. C. A. 6th Cir.), 134 Fed. Rep. 224, 13 Am. B. R. 403.

[34] *Ex parte* Crabb, 8 De Gex, Mac. & G. 277; *Ex parte* Daubenny, 3 Mont & Ayr, 16, s. c. 2 Deac. 72.

[35] Cobb v. Symonds, 5 B. & A. 516; *Ex parte* Meymot, 1 Atk. 196.

[36] *In re* Suburban Electric Co. (District of Kentucky, 1900, not reported.)

But see *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; affirmed in *In re* Morris, 102 Fed. Rep. 1004.

[37] *In re* Surety, Guarantee & Trust Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129; *Ex parte* Conant, 77 Me. 275; *In re* Woodward, No. 18001, Fed. Cas., s. c. 8. Ben. 563; *In re* Moss, No. 9877, Fed. Cas., s. c. 19 N. B. R. 132.

But see Leighton & Co., 147 Fed. Rep. 311.

[38] *In re* N. Y. Building Loan Banking Co., 127 Fed. Rep. 471, 11 Am. B. R. 51.

[39] *In re* Smith, No. 12981, Fed. Cas., s. c. 2 Low. 69.

[40] *In re* Woodside Coal Co., 105 Fed. Rep. 56, 5 Am. B. R. 186; *In re* Elk Park Min. & Mill Co., 101 Fed. Rep. 422, 4 Am. B. R. 131; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep. 982, 4 Am. B. R. 327; *In re* Chicago-Joplin Lead & Zinc Co., 104 Fed. Rep. 67, 4 Am. B. R. 712; McNamara v. Helena Coal Co., 5 Am. B. R. 48; *In re* Keystone Coal Co., 109 Fed. Rep. 872, 6 Am. B. R. 377. By the amendment of 1903 a mining company may now be made an involuntary bankrupt.

[41] *In re* Merritt, 7 Fed. Rep. 853.

[42] *In re* Union Pac. R. Co., No. 14376, Fed. Cas., s. c. 10 N. B. R. 178; *In re* Philadelphia & Lewes Transp. Co., 114 Fed. Rep. 403, 7 Am. B. R. 707; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139, 10 Am. B. R. 424.

[43] *In re* Kimball, 7 Fed. Rep. 461; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139, 10 Am. B. R. 424.

[44] *Ex parte* Gallimore, 2 Rose, 424.

time to time buys paintings, but not in the course of his regular business,[45] or a water supply company engaged in the business of obtaining, transporting and supplying water for municipal and domestic use for fixed rentals,[46] or an inn, hotel or boarding-house keeper,[47] or a saloon and restaurant,[48] or a social club,[49] or a laundry,[50] or a circulating library,[51] or a grain warehouse,[52] or a newspaper advertising company,[53] or an incorporated mercantile agency.[54]

Printing and Publishing Companies.—A printing or publishing corporation to fall within the provisions of this act, is one principally engaged in printing or publishing; that is, the manufacture and issue from the press and putting upon the market for sale books and pamphlets as ordinarily understood by the use of these words. An incorporated mercantile agency, although it may print and publish matter incident to its prin-

If he buys fish from other boats at sea and sells them on shore he is a trader. Heaney v. Birch, 1 Rose, 356, s. c. 3 Camp. 233.

[45] *In re* Chapman, No. 2601, Fed. Cas., s. c. 9 Ben. 311.

[46] *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508, affirmed in *In re* Morris (C. C. A. 2d Cir.), 102 Fed. Rep. 1004.

[47] *In re* United States Hotel Co. (C. C. A. 6th Cir.), 134 Fed. Rep. 225, 13 Am. B. R. 403; *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; Sunderson v. Rowles, 4 Burr. 2064; *Ex parte* Bowers, 2 Deac. 99; *Ex parte* National Deposit Bank, 26 W. R. 624.

In re San Gabriel Sanitorium Co., 95 Fed. Rep. 271, 2 Am. B. R. 408, a corporation which owned and maintained a private hospital for profit and not as a charity, has been adjudged an involuntary bankrupt.

[48] *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173.

[49] *In re* Fulton Club, 113 Fed. Rep. 997, 7 Am. B. R. 670.

[50] *In re* White Star Laundry, 117 Fed. Rep. 570, 9 Am. B. R. 30. But see *In re* Troy Laundering Co., 132 Fed. Rep. 266, 13 Am. B. R. 97.

[51] *In re* Parmelee Library (C. C. A. 7th Cir.), 120 Fed. Rep. 235, 9 Am. B. R. 568.

[52] Pacific Coast Warehouse Co., 123 Fed. Rep. 749, 10 Am. B. R. 474.

[53] *In re* Snyder & Johnson Co., 133 Fed. Rep. 806, 13 Am. B. R. 325.

[54] Zugalla v. International Mercantile Agency, 142 Fed. Rep. 927, 16 Am. B. R. 67.

cipal business, is not a printing or publishing company within the meaning of the bankrupt act.[55]

Mining Companies.—Prior to the amendment of 1903 mining corporations were not subject to be adjudicated bankrupts in involuntary proceedings.[56] By that amendment mining companies were brought within the act by the addition of the word "mining" to the pursuits mentioned in the original act.[57] It has been held to include quarrying, as of slate or stone from a quarry.[58]

"Mercantile Pursuits."—Mercantile pursuits, as generally understood, are those which pertain to merchants or the traffic carried on by merchants, or having to do with trade or commerce.

The phrase "mercantile pursuits" may have a little broader signification than the word "trading." It signifies for the most part the same thing as the word "trading."[59] In the decisions it has usually been associated with the word "trading" in determining whether a corporation was subject to be adjudicated a bankrupt,[60] and the cases relating to trading companies are in point with reference to whether the corporation is engaged in mercantile pursuits.

Common Carriers and Insurance Companies.—Railroad, steamship, steamboat and canal companies,[61] and insur-

[55] Zugalla v. International Mercantile Agency, 142 Fed. Rep. 927, 16 Am. B. R. 67.

[56] *In re* Woodside Coal Co., 105 Fed. Rep. 56, 5 Am. B. R. 186. See cases collected in note 40 *ante*.

[57] B. A. 1898, Sec. 4*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[58] *In re* Mathews Consolidated Slate Co., 144 Fed. Rep. 724, 16 Am. B. R. 350; *In re* Quincy Granite Quarries Co., 147 Fed. Rep. 279.

[59] *In re* N. Y. & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; Zugalla v. International Mercantile Agency, 142 Fed. Rep. 927, 16 Am. B. R. 67.

[60] *In re* N. Y. & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; *In re* Surety, Guarantee & Trust Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73, 9 Am. B. R. 129; *In re* White Star Laundry Co., 117 Fed. Rep. 570, 9 Am. B. R. 30; *In re* Oriental Co., 104 Fed. Rep. 975, 5 Am. B. R. 219; *In re* Tontine Surety Co., 116 Fed. Rep. 401, 8 Am. B. R. 421.

But see Troy Laundering Co., 132 Fed. Rep. 266, 13 Am. B. R. 97.

[61] New Orleans, &c., R. R. Co. v. Delamore, 114 U. S. 506, and cases there collated.

ance companies[62] were held subject to be adjudged bankrupts as "moneyed, business or commercial corporations" under the act of 1867.[63] The provisions of the present act are not broad enough to include the railroad and transportation companies and insurance companies.[64] The intent of the framers of this law seems to have been to leave such corporations to be dealt with by the laws of the state creating them.[65] It may be observed that the law and practice with reference to winding up the affairs of such insolvent incorporations became very largely settled under the existing statutes during the twenty-five years previous to the passage of the bankrupt act.

§ 48a. Unincorporated companies.

Any unincorporated company may be adjudged an involuntary bankrupt.[1] There is no restriction in respect to such companies as in the case of corporations. This phrase includes partnerships[2] and also that class of unincorporated associations, recognized as legal, which are neither corporations nor partnerships. In this last class may be included mutual insurance societies,[3] labor and employers' unions, social and political clubs, building and loan associations, agricultural societies, stock and produce exchanges and the like, not incorporated, in which the members are not liable as partners. A joint stock company may be adjudged a bankrupt under this provision if it is not a corporation.[4]

[62] *In re* Independent Ins. Co., No. 7017, Fed. Cas., s. c. 1 Holmes 103; *In re* Hercules Mut. Ins. Co., No. 6402, Fed. Cas., s. c. 6 Ben. 35; *In re* Merchants' Ins. Co., No. 9441, Fed. Cas., s. c. 3 Biss. 162.

[63] R. S. Sec. 5122.

[64] *In re* Philadelphia & Lewes Transp. Co., 114 Fed. Rep. 403, 7 Am. B. R. 707; Quimby Freight Forwarding Co., 121 Fed. Rep. 139, 10 Am. B. R. 424, affirmed (C. C. A. 1st Cir.), 126 Fed. Rep. 167, 11 Am. B. R. 205; *In re* Cameron, etc., Ins. Co., 96 Fed. Rep. 756, 2 Am. B. R. 372.

[65] See paragraph XII of the statement of the conference committee to the House of Representatives, June 28, 1898, vol. 31, Cong. Record, p. 7205.

[1] B. A. 1898, Sec. 4.

[2] See Sec. 97, *post*.

[3] *In re* Seaboard Fire Underwriters, 137 Fed. Rep. 987, 13 Am. B. R. 722; *In re* Grand Lodge A. O. U. W. of Wisconsin (District Court, West. Dist. of Wis. 1907).

[4] In re Hercules Atkins Co., 133 Fed. Rep. 813, 13 Am. B. R. 369.

CHAPTER VIII.

ACTS OF BANKRUPTCY.

§ 49. Who may commit an act of bankruptcy.

To support an adjudication of bankruptcy the debtor must have committed an act of bankruptcy within four months before the filing of the petition.[1] Any person who may be adjudged a bankrupt may commit an act of bankruptcy. But the act must be committed by the person himself, or at least within his knowledge and consent. It is clear that a person can not commit an act of bankruptcy by the conduct of his agent without his knowledge or consent.[2]

To support an adjudication of bankruptcy against a partnership it seems that formerly there must have been separate acts of bankruptcy by each partner.[3] The present act provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[4] Under the present act a partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more (but less than all) of the partners, where such act was within the scope of the partnership business so as to

[1] B. A. 1898, Sec. 3*b*.

[2] Cotton v. James, M. & M. 273; *Ex parte* Blain, 12 Chan. Div. 522.

[3] Allen v. Hartley, 4 Doug. 20; *In re* Redmond, No. 11632. Fed. Cas., s. c. 9 N. B. R. 408, and cases cited in opinion. *In re* Weaver, No. 17307, Fed. Cas., s. c. 9 N. B. R. 132; *In re* Waite, No. 17044, Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150, Fed. Cas., s. c. 3 Biss. 122.

It was held not evidence of an act of bankruptcy by three partners of a banking concern, where one of them, who resided at the place where the banking-house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking-house, shut it up and stopped payment. Mills v. Bennett, 2 M. & S. 556; s. c. 2 Rose, 269.

[4] B. A. 1898, Sec. 5*c*.

constitute in fact an act of the firm.[5] The sale by one member of an insolvent firm of his interest to his partner is an act of bankruptcy, and the court will set it aside as fraudulent and proceed to distribute the property as firm property.[6] But a conveyance by a partner of his individual property, although with intent to prefer a firm creditor, does not constitute an act of bankruptcy by the firm, and will not sustain proceedings in bankruptcy against the partnership.[7]

§ 50. What are acts of bankruptcy?

The bankrupt statute, as amended Feb. 5, 1903, enumerates five acts of bankruptcy relating to the disposition of the debtor's property and to his circumstances and credit. Acts of bankruptcy under the statute[1] by a person "consist of his having

First, "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

Second, "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

Third, "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of

[5] *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516; *In re* Grant, 106 Fed. Rep. 496; *In re* Shapiro, 106 Fed. Rep. 495; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794. See also Sec. 97, *post*.

[6] *In re* Waite, No. 17044, Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150, Fed. Cas., 3 Biss. 122; *In re* Shapiro, 106 Fed. Rep. 495.

[7] Hartman v. Peters & Co., 146 Fed. Rep. 82.

[1] B. A. 1898, Sec. 3*a*, and 32 Stat. at L. 797.

In re Empire Metallic Bedstead Co., 98 Fed. Rep. 981, 3 Am. B. R. 575, 2 N. B. N. 304. The circuit court of appeals for the second circuit, said: "When acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class."

any property affected by such preference vacated or discharged such preference; or

Fourth, "made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or

Fifth, "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It may be observed that under the former bankrupt statutes there were acts of bankruptcy relating to the person of the debtor. Thus it constituted an act of bankruptcy to depart or be absent from the state, district or territory of which the debtor was an inhabitant, with intent to defraud his creditors,[2] or to conceal himself to avoid service of legal process.[2] There is no such act of bankruptcy under the present statute.

In case a debtor absconds or conceals himself to avoid the service of process and hinder, delay or defraud his creditors by so doing, the remedy under the present act is to commence a suit against his property. Under the laws of the several states this is a ground for attaching the property of the debtor, which may be sold to pay the debt. Hence a creditor may begin legal proceedings under the state law. In case the debtor is solvent, creditors will secure their debts under such proceedings without resorting to bankruptcy. In case the property is insufficient to cover all claims made and satisfy all attachments issued, or one creditor is gaining a preference over another by such proceedings, if such attachments, or any one of them, are not released five days before the sale of the property attached, an act of bankruptcy is committed. The creditors may file a petition to have the debtor adjudged a bankrupt. All attachments so levied, or liens of any nature gained by legal proceedings within four months before the filing of the petition,

[2] For acts of bankruptcy under the acts of 1800 and 1841 see historical sketch, pages 7 and 10, *ante.* For the acts of bankruptcy under the act of 1867, see R. S. Sec. 5021.

are null and void.[3] Thus creditors of every degree will come in equally for proportionate shares of the bankrupt's estate. If, however, an insolvent debtor absconds and takes property with him he commits an act of bankruptcy, as he conceals and removes his property.[4]

If a debtor has committed an act of bankruptcy he can not avoid the consequences of it by a subsequent rescission or undoing thereof.[5] A creditor can not complain of an act committed before he was a creditor.[6]

§ 50a. Insolvency as an element of an act of bankruptcy.

It should be observed that insolvency of the debtor is an essential element of some acts of bankruptcy and is not a requisite element of other acts of bankruptcy.

It is not necessary that a person who transfers, conveys, etc., property should be insolvent at the time to constitute an act of bankruptcy under the first clause. He must be insolvent at the time the petition is filed. Actual solvency at the time of filing the petition is a complete defense to a petition charging an act of bankruptcy under the first clause and the burden of proving his solvency is on the alleged bankrupt.[1]

A person can not commit an act of bankruptcy under the second and third clauses while he is solvent. He must be insolvent at the time of the transfer or of permitting a preference through legal proceedings.[2] If the debtor takes issue on the question of his solvency at that time, the burden of proving insolvency is on the petitioning creditors, except in case of his actual failure to attend with his books, papers and accounts and submit to an examination, as provided in Sec. 3*d*, in which

[3] B. A. 1898, Sec. 67*f*. See Sec. 192 *et seq. post.*

[4] *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332.

[5] *In re* Ryan, No. 12183, Fed. Cas., s. c. 2 Saw. 411.

[6] Beers v. Hanlin, 3 Am. B. R. 745, 99 Fed. Rep. 695; *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551.

[1] B. A. 1898, Sec. 3*c*. *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162.

[2] *In re* Hines, 144 Fed. Rep. 142, 16 Am. B. R. 295; Chicago Title & Trust Co. v. Roebling's Sons Co., 107 Fed. Rep. 71, 5 Am. B. R. 368,

case the burden of proving his solvency rests upon the debtor.[3] Under Sec. 3*a*, clauses 2 and 3, the solvency of the debtor at the time the petition in bankruptcy is filed is immaterial.[4]

Under clauses 4 and 5 as originally enacted the solvency or insolvency of the debtor either at the time of committing the act of bankruptcy or at the time of filing the petition is immaterial.[5] By the amendment of 1903 [6] it is provided that in the case a receiver or trustee has been appointed to take charge of the property of a person, such person must be insolvent at the time he applied for the receiver or when the appointment was made upon the application of another then at the time the receiver or trustee took charge of his property.[7] Insolvency of the debtor at the time the petition in bankruptcy is filed is immaterial.[8]

A person is deemed insolvent whenever the aggregate of his property exclusive of any property which may be conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[9]

In determining whether a person is solvent or insolvent at a particular time the value of the assets at that time should be taken at a fair valuation.[10] A fair valuation means the actual value—its real or market value—and not the face value of commercial paper.[11] It is what property would sell for in the regular course of business, but not what the property would

[3] B. A. 1898, Sec. 3*d*. West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098; 2 Am. B. R. 463; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Bogen & Trummel v. Protter, 129 Fed. Rep. 533, 12 Am. B. R. 288.

[4] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[5] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[6] 32 Stat. at L. 797.

[7] B. A. 1898, Sec. 3*a*, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[8] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[9] B. A. 1898, Sec. 1, cl. 15.

[10] *In re* Coddington, 118 Fed. Rep. 281, 9 Am. B. R. 243.

[11] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

sell for at a forced sale.[12] Where the levy on the property of a debtor depreciates its value so that the debtor's assets are then less than his liabilities, he was not insolvent at the time of the judgment on which execution issued and no preference resulted.[13] The valuation for the test of solvency or insolvency in case of a preferential mortgage must relate to the conditions as a going concern when the alleged preference was given and not to the mere dead matter of a plant after bankruptcy intervenes.[14]

In computing the assets of the debtor to determine his solvency or insolvency all his property which has value should be included. It has been held that in determining the question of solvency there should be included property exempt under the state law,[15] and property transferred in payment of or as security for a just debt irrespective of whether it constitutes a preference or not.[16] But where property is transferred in fraud of creditors the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is solvent.[17] Presumptive profits on goods which have been ordered, but not received, are not considered as assets.[18] A note given by a bankrupt secured by a mortgage on the property of another, should be included as a liability.[19]

In determining the solvency or insolvency of a partnership it must appear that not only the firm is insolvent, but that each partner is individually insolvent.[20]

[12] Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649; *In re* Hines, 144 Fed. Rep. 143, 16 Am. B. R. 295.

[13] Chicago, etc., Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368

[14] Butler Paper Co. v. Goembel (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 16 Am. B. R. 26.

[15] *In re* Baumann, 96 Fed. Rep. 946, 3 Am. B. R. 196.

[16] *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547.

[17] *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547; *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645. Lansing Boiler and Engine Co. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558.

[18] In re Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

[19] *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645.

[20] *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645; Vaccaro v. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474; *In re* Perley & Hays,

In determining the solvency or insolvency of a corporation its bonded indebtedness should be included as a liability, although the bonds are claimed to be invalid.[21] The liability of stockholders is not an asset.[22]

The statute provides that "a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.[23]

"If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance." [23]

This right of jury trial is confined to the debtor. Creditors are not entitled to demand a jury trial on the question of the bankrupt's solvency,[24] nor of the allowance of their claims.[25] The right to a trial by jury on written application of the alleged bankrupt is absolute and can not be withheld at the discretion of the court.[26] In that respect it differs from the trial of an

138 Fed. Rep. 927, 15 Am. B. R. 54; Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588. See also *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140.

[21] First National Bank v. Ice Co., 136 Fed. Rep. 466, 14 Am. B. R. 448.

[22] First National Bank v. Ice Co., 136 Fed. Rep. 466, 14 Am. B. R. 448.

[23] B. A. 1898, Sec. 19*a* and *b*. See also R. S. Sec. 566.

As to the effect of a jury trial after being waived by bankrupt, see *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160.

[24] *In re* Herzikopf (C. C. A. 9th Cir.), 121 Fed. Rep. 544, 9 Am. B. R. 745.

[25] *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R. 99.

[26] Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50

issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.[26] The judge and not the referee should preside at a jury trial.

The books of a bankrupt are evidence on the question of his insolvency within four months of the date of filing the petition, but are not conclusive on this subject.[27] The schedules and the inventories and appraisements are also evidence upon the same question.[28] Actual sales of property by a receiver is evidence of the market value of the property.[29] Giving a post-dated check or note is not evidence of insolvency.[30]

The adjudication of bankruptcy raises no presumption of insolvency at a previous date, unless founded upon an act of bankruptcy involving insolvency as an element. In such a case the adjudication is conclusive of insolvency at the date the act of bankruptcy was committed.[32] A debtor is presumed to know his financial condition and he will be presumed to intend to prefer if in effect he was insolvent at the time he created the preference, but he may rebut this presumption with evidence.[33]

Where a referee has twice made a report on the solvency of the debtor the court will refuse to disturb his decision.[34] The judgment of a court on a jury trial may be reviewed in a circuit court of appeals on writ of error.[35]

[27] *In re* Docker, Foster & Co., 123 Fed. Rep. 190; 10 Am. B. R. 584.

[28] *In re* Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. 584.

[29] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 799, 6 Am. B. R. 300. But see Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649.

[30] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[31] *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[32] De Graff v. Lang, 87 N. Y. Supp. 78, 92 N. Y. Sup. Ct. App. Div. 564.

[33] *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101.

[34] *In re* Rome Planing Mills, 99 Fed. Rep. 937, 3 Am. B. R. 766.

[35] Elliott v. Toeppner, 187 U. S.

§ 51. First: Fraudulent transfers.

The first act of bankruptcy mentioned consists of the debtor having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay or defraud his creditors, or any of them.[1] A conveyance or transfer made with intent to hinder, delay or defraud creditors, or any of them, is fraudulent and may be avoided by the trustee of the grantor.[2] What are fraudulent conveyances is considered in another place.[3] The making of a transfer or conveyance of property, with intent to hinder, delay or defraud creditors, or any of them, is made by this provision an act of bankruptcy.[4] It has been held that this clause of the act applies only to transfers which are fraudulent at common law.[5]

A transfer to a *bona fide* purchaser for a present fair consideration is not ordinarily such a transfer as to make the sale an act of bankruptcy.[6] But it may be conceived that if the sale were made with intent on the part of the debtor to hinder, delay or defraud his creditors it might be an act of bankruptcy, although the sale could not be set aside and the *bona fide* purchaser would be protected.[7] It has been held an act of bankruptcy where an insolvent debtor conveyed all his property to a trustee with directions as to the payment to his creditors without preference and the deed contained a condition of defeasance and equity reserved in the property to the grantor

327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649; Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493.

[1] B. A. 1898, Sec. 3*a*, clause 1.

[2] B. A. 1898, Sec. 67*e*.

[3] Sec. 194, *post*.

[4] B. A. 1898, Sec. 3*a*.

[5] Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453. Lansing Engine, etc., Co. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; *In re* Belknap, 129 Fed. Rep. 646, 12 Am. B. R. 326.

[6] Tiffany v. Lucas, 15 Wall. 421, 21 L. Ed. 198; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233; *In re* Pusey, No. 11478 Fed. Cas., s. c. 7 B. R. 45.

[7] See Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; Boyd v. Lemon & Gale Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 8 Am. B. R. 81; *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233.

after the satisfaction of the claims of the beneficiaries, in that such transfer was made to hinder, delay and defraud his creditors and not a transfer to prefer creditors.[8] A voluntary procuring of the appointment of a receiver in proceedings for the dissolution of an insolvent corporation has been held not to be a transfer with intent to hinder, delay, etc.[9] But under the amendment to 3*a*, cl. 4, this is made an act of bankruptcy. It is not an act of bankruptcy to transfer property where the only creditor is one holding an unliquidated claim for damages for a tort.[10] It should be borne in mind that it is the fraudulent intent of the debtor alone that determines whether the act complained of is an act of bankruptcy or not.[11] In determining the question of intent the court or jury should consider the necessary result of the acts done by the debtor, for every one is presumed to contemplate the necessary consequences of his conduct.[12] It is immaterial whether the purchaser acts in good faith or not.

In addition to making fraudulent transfers, the concealing or removing of property with the same intent and purpose constitutes an act of bankruptcy.[13] It seems that it is not

[8] Rumsey & Sikemier v. Novelty and Machine Mfg. Co., 99 Fed. Rep. 699, 3 Am. B. R. 704, 2 N. B. N. 128.

[9] *In re* Harper Bros., 100 Fed. Rep. 266, 3 Am. B. R. 804, 2 N. B. N. 605; *In re* Baker-Ricketson Co., 97 Fed. Rep. 489, 4 Am. B. R. 605; Vacarro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 103; *In re* H. Zeltner Brewing Co., 117 Fed. Rep. 799, 9 Am. B. R. 63.

[10] Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745.

[11] *In re* Wilmington Hosiery Co., 120 Fed. Rep. 179, 9 Am. B. R. 581; Hausing Boiler and Engine Works v. Ryerson & Sons (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; *In re* McKibben, No. 8859 Fed. Cas., s. c. 12 N. B. R. 97; *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231, the court said Drummond positively swears that he had no such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely. See also *In re* Franklin, No. 5053 Fed. Cas., s. c. 8 Ben. 233.

[12] Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 12 Am. B. R. 610.

[13] Anonymous, No. 466 Fed. Cas., s. c. 1 Pac. Law, Rep. 173; Livermore v. Bagley, 3 Mass. 487; Fox v. Eckstein, 5009 Fed. Cas., s. c. 4 N. B. R. 373; *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332; Citizens Nat. Bank v. De Pauw Co. (C. C. A. 7th Cir.), 105 Fed. Rep. 926; *In re* Shapiro, 106 Fed. Rep. 495, 3 N. B. N. 385.

necessary to physically remove or conceal the property, but that the concealment of the actual title to the property by fictitious legal proceedings or otherwise is considered a concealment or removal of property within this provision.[14] It is not concealing property within the meaning of this provision not to disclose property which is not properly assets of the bankrupt.[15] It is not a removal where a receiver takes possession of a debtor's property.[16]

Actual solvency at the time of filing the petition is a complete defense to proceedings instituted under this clause and the burden of proving solvency is on the alleged bankrupt.[17] Insolvency at the time of the conveyance, transfer, etc., is not essential to constitute an act of bankruptcy under this clause.

§ 52. Second: Preference created by the debtor.

An act of bankruptcy by a person may consist of his having transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors.[1] To constitute an act of bankruptcy within this provision three things must occur:[2]

First, The debtor must have transferred property of his own to a creditor.[3] By transfer is included the sale and every

[14] *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645; *In re* Hussman, No. 6951 Fed. Cas., s. c. 2 N. B. R. 437; *In re* Williams, No. 17703 Fed. Cas., s. c. 3 N. B. R. 286; O'Neil v. Glover, 5 Gray 159; Anonymous, No. 466 Fed. Cas., s. c. 1 Pac. Law. Rep. 173.

"Conceal" shall include secrete, falsify and mutilate; B. A. 1898, Sec. 1, clause 22.

[15] *In re* Scott, 11 Fed. Rep. 133; *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645.

[16] *In re* Wilmington Hosiery Co., 120 Fed. Rep. 179, 9 Am. B. R. 581.

[17] B. A. 1898, Sec. 3*c*, and *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162; *In re* West (C. C. A. 2d Cir.), 108 Fed. Rep. 940, 5 Am. B. R. 734.

[1] B. A. 1898, Sec. 3, clause 2.

[2] *In re* Rome Planing Mill Co., 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531, Judge Coxe said: "In order to succeed under this subdivision the petitioners must prove: First: A transfer of the debtor's property to a creditor. Second The debtor's intent to prefer such creditor. Third: The insolvency of the debtor at the date of the transfer."

[3] *In re* Foster, 126 Fed. Rep. 1014, 11 Am. B. R. 131.

other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.[4]

Second, The debtor must have been insolvent at the time of the transfer. A person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[5]

Third, The debtor must have intended to prefer such creditors over his other creditors.[6]

What constitutes a fraudulent preference under the bankrupt act, and when it may be avoided, is defined by the statute,[7] and is the subject of consideration elsewhere.[8] The present provision makes preferences as such acts of bankruptcy.

It should be observed that giving a preference may be an act of bankruptcy, although the trustee may not be able to avoid the preference.[9] The debtor may intend to prefer the creditor, although no fraudulent intent is known to or participated in by the creditor. The statute expressly provides that the trustee may avoid a preference only when the person to be benefited "shall have had reasonable cause to believe that it was intended thereby to give a preference."[10] But the intent of the debtor only is to be considered in determining whether he has committed an act of bankruptcy within this provision. His intent is to be presumed from the nature of the transaction and his acts in connection therewith.[11] If he

[4] B. A. 1898, Sec. 1, clause 25.

[5] B. A. 1898, Sec. 1, clause 15. See Sec. 50*a*, *ante*.

[6] *In re* Ewing (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 8 Am. B. R. 269; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300.

[7] B. A. 1898, Sec. 60.

[8] Preferences, Chap. XVIII.

[9] *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231.

[10] B. A. 1898, Sec. 60.

[11] Johnson v. Waid (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 2 Am. B. R. 84; *In re* McGee, 105 Fed. Rep. 895, 5 Am. B. R. 262; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; *In re* Douglas Coal & Coke

has knowledge of his insolvency such an intent is conclusively presumed.[12]

Thus it has been held sufficient to constitute an act of bankruptcy for a person to transfer all of his property to a part of his creditors,[13] or to his wife,[14] or to mortgage all of his property to a creditor,[15] or to effect a composition with all of his creditors but one and pay him in full,[16] or to pay any creditor in full while insolvent,[17] or to pay wages,[18] or to pay a private

Co., 131 Fed. Rep. 769, 12 Am. B. R. 539.

In Toof v. Martin, 13 Wall. 48, 20 L. Ed. 481, Mr. Justice Field said: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

See also Miller v. Keys, No. 9578 Fed. Cas., s. c. 3 N. B. R. 224; *In re* Oregon Bulletin Print. and Pub. Co., No. 10559 Fed. Cas., s. c. 13 N. B. R. 503.

[12] *In re* Ed. W. Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101.

[13] Johnson v. Wald (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 2 Am. B. R. 84; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Grant, 106 Fed. Rep. 496; *In re* Drummond, No. 4094 Fed. Cas., s. c. 4 Biss. 149; *In re* House, No. 6735 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 348; *In re* Foster, No. 4964 Fed. Cas., s. c. 18 N. B. R. 64.

[14] *In re* Alexander, No. 161 Fed. Cas., s. c. 1 Low. 470.

[15] *In re* Edelman (C. C. A. 2d Cir.), 130 Fed. Rep. 700, 12 Am. B. R. 238; *In re* Riggs Restaurant Co., 130 Fed. Rep. 691, 11 Am. B. R. 508; *In re* Ed. W. Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345; Baldwin v. Rosseau, No. 803 Fed Cas., s. c. 1 N. Y. Leg. Obs. 391; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Dunham, No. 4143 Fed. Cas., s. c. 2 Ben. 488; *In re* Rogers, No. 12002 Fed. Cas., s. c. 2 N. B. R. 397.

[16] Curran v. Munger, No. 3487 Fed. Cas., s. c. 6 N. B. R. 33.

[17] Rex Buggy Co. v. Hearick (C. C. A. 8th Cir.), 132 Fed. Rep. 310, 12 Am. B. R. 726; *In re* Oregon Bulletin Printing and Publishing Co., No. 10559 Fed. Cas., s. c. 13 N. B. R. 503; Silverman's Case, No. 12855 Fed. Cas., s. c. 1 Saw. 410; *In re* Dibblee, No. 3884 Fed. Cas., s. c. 3 Ben. 283; s. c. Subnom. Clark v. Iselin, 21 Wall. 360.

[18] Kenyon v. Fenton, 6 N. B. R. 238. Note to case No. 17780 Fed. Cas.

debt out of partnership property,[19] or to transfer a note to a creditor as security for a pre-existing debt,[20] or to transfer property for present and future advances,[21] or to pay an overdraft on a bank,[22] or to sell one's property to a person not a creditor and apply the proceeds in full payment of some creditors leaving others unpaid,[23] or to assign earnings to become due under a building contract.[24]

On the other hand, it has been held not to constitute an act of bankruptcy where a payment is made under the belief that the debtor is solvent,[25] or where, at the time of payment, he had no other creditors,[26] or to make a change of securities,[27] or the payment of unearned premiums on policies of insurance,[28] or an executory agreement by a railway company to transfer certificates of stock to a creditor,[29] or to pay a percentage on claims of a part of his creditors when the others will receive the same percentage,[30] or the return of a piano ordered for a customer who refused to receive it,[31] or the payment of rent to preserve a valuable lease.[32]

[19] *In re* Grant, 106 Fed. Rep. 496; *In re* Mattot, No. 9282 Fed. Cas., s. c. 16 N. B. R. 485.

[20] *Ex parte* Shouse, No. 12815 Fed. Cas., s. c. Crabbe, 482.

[21] *Ex parte* Potts, No. 11344 Fed. Cas., s. c. Crabbe 469.

[22] Payne v. Soloman, No. 10856 Fed. Cas., s. c. 14 N. B. R. 162.

[23] Boyd v. Lemon & Gale Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 8 Am. B. R. 81. See also Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453.

[24] *In re* O'Donnell, 131 Fed. Rep. 150, 12 Am. B. R. 621.

[25] *In re* Bloch (C. C. A. 2d Cir.), 109 Fed. Rep. 790, 6 Am. B. R. 300; Morgan v. Mastick, No. 9803 Fed. Cas., s. c. 2 N. B. R. 521; *In re* Munn, No. 9925 Fed. Cas., s. c. 3 Biss. 442.

[26] Brake v. Callison (C. C. A. 5th Cir.), 129 Fed. Rep. 196, 11 Am. B. R. 797.

[27] Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; *In re* Cutting, 145 Fed. Rep. 388; *In re* Weaver, No. 17307 Fed. Cas., s. c. 9 N. B. R. 132; *In re* Union Pac. R. Co., No. 14376 Fed. Cas., s. c. 10 N. B. R. 178. But see Anniston Iron & Supply Co. v. Rolling Mill Co., 125 Fed. Rep. 974, 11 Am. B. R. 200, where it was held that the transaction amounted to more than a mere change of securities.

[28] Knickerbocker v. Comstock, No. 7879 Fed. Cas., s. c. 9 N. B. R. 484.

[29] Winter v. Railway Co., No. 17890 Fed. Cas., s. c. 2 Dill. 487.

[30] *In re* Hapgood, No. 6044 Fed. Cas., s. c. 2 Low. 200; Jones v. Sleeper, No. 7496 Fed. Cas., s. c. 2 N. Y. Leg. Obs. 131.

[31] Doan v. Compton, No. 3940 Cas., s. c. 2 N. B. R. 607.

[32] *In re* Pearson, 95 Fed. Rep. 425, 2 Am. B. R. 282; *In re* Mer-

§ 53. Third: Preferences created by legal proceedings.

An act of bankruptcy by a person may consist of his having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.[1]

Two elements are necessary to constitute an act of bankruptcy under this provision.[2] *First,* the debtor must have been insolvent at the time the preference was created, and, *second,* he must have suffered or permitted it without having vacated or discharged it within five days before the sale or disposition of the property.

No intent on the part of the debtor to create a preference is required,[2] as there was under the act of 1867,[3] which provided that a person commits an act of bankruptcy who "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors."

An act of bankruptcy under this clause ordinarily cannot be completed until within five days before the sale or final disposition of the property taken on legal process, for the debtor may at any time prior to that date vacate or discharge the preference. *Non constat* he will do so. In such case no act of bankruptcy is committed. But when the insolvent puts it

chants Insurance Co., No. 9441 Fed. Cas., s. c. 3 Biss. 162; *Contra,* Smith v. Teutonia Ins. Co., No. 13115 Fed. Cas., s. c. 6 Am. Law Rev. 584.

In re Lange, 97 Fed. Rep. 197, 2 N. B. N. 85, 3 Am. B. R. 232, Judge Brown said: "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded," and held it an act of bankruptcy in that case.

[1] B. A. 1898, Sec. 3, clause 3. *In re* Reichman, 191 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[2] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531; Bogen v. Protter (C. C. A. 6th Cir.), 129 Fed. Rep. 533, 12 Am. B. R. 288.

[3] R. S. Sec. 5021, par. 7th, embracing a part of Sec. 39 of the act of March 2, 1867, 14 Stat. at L. 536, as amended June 22, 1874, 18 Stat. at L. 180.

out of his power to vacate the preference he then commits an act of bankruptcy.[4]

Insolvency of the Debtor.—The debtor must have been insolvent at the time the preference was created by the legal proceedings. A person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[5]

It is not an act of bankruptcy for a solvent debtor to suffer or permit an execution, levy and sale of his property under legal proceedings. Where a judgment is obtained against a person while he is solvent it has been held that an execution may be subsequently issued when the person is insolvent.[6] The preference is obtained when the lien of judgment attaches, not when execution is issued.[7] Where a levy on property of the debtor depreciates its value so that his assets are then less than his liabilities he is not insolvent within the meaning of the statute.[8]

"Suffered or Permitted," etc.—By the phrase "suffered or permitted" Congress manifestly intended that a preference might be created by legal proceedings sufficient to constitute an act of bankruptcy, although the debtor did nothing tending to aid in procuring the preference or to show an affirmative desire, and although he resisted the obtaining of the preference. This construction has been placed upon this phrase by the supreme court.[9]

[4] Scheuer v. Smith & Montgomery, etc., Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

[5] B. A. 1898, Sec. 1, clause 15. As to solvency, see Sec. 50*a*, *ante*.

[6] Field v. Baker, No. 4762 Fed. Cas., s. c. 12 Blatch. 438.

[7] Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717.

[8] Chicago, etc., Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368.

[9] Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147. See also Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 10 Am. B. R. 329, affirming 119 Fed. Rep. 989, 9 Am. B. R. 441; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; *In re* Reich-

If a preference is created by the legal proceedings within the meaning of section 60 of the act, such preference may be set aside. If no preference within the meaning of this section is created, the proceedings will be valid and the creditor protected. But whether it is a valid preference under that section has nothing to do with determining whether an act of bankruptcy has been committed or not.

Legal Proceedings.—The phrase legal proceedings, as used in the bankrupt law, undoubtedly refers to any proceedings had in a court of justice, either state or federal. It is equivalent to the words "legal process" used in the act of 1867 [10] as construed by the courts.[11] It is not confined to any particular form of writ, execution or attachment. It is rather a writ, mandate or order of the court taking hold of the property and withdrawing it from the possession and control of the debtor and from the ordinary reach of creditors for the payment of what is due to them. Each and any such proceeding is within the intent and true meaning of the term "legal proceedings" as used in this provision.[12] Thus it may be by an attachment proceeding,[13] or by an execution upon judgment,[14] or by levying execution on judgment upon a note containing a warrant of attorney to confess judgment.[15] It does

man, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577; *In re* Thomas, 103 Fed. Rep. 272, 4 Am. B. R. 571; Bogen & Trummel v. Protter (C. C. A. 6th Cir.), 129 Fed. Rep. 533, 12 Am. B. R. 288; *In re* Rung Furniture Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 526, 14 Am. B. R. 12.

[10] R. S. Sec. 5021.

[11] *In re* Merchants' Insurance Co., No. 9441 Fed. Cas., s. c. 3 Biss. 162; *In re* New Amsterdam Fire Ins. Co., No. 10140 Fed. Cas., s. c. 6 Ben. 368; *In re* Bininger, No. 1420 Fed. Cas., s. c. 7 Blatch. 270; *In re* Washington Marine Ins. Co., No. 17246 Fed. Cas., s. c. 2 Ben. 292.

[12] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531.

[13] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220, 2 N. B. N. 134; *In re* Reichman, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Harper, 105 Fed. Rep. 900, 5 Am. B. R. 567.

[14] *In re* Ferguson, 95 Fed. Rep. 429, 2 Am. B. R. 586; *In re* Storm, 103 Fed. Rep. 618, 4 Am. B. R. 601.

[15] *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577. But see *In re* Nelson, 1 Am. B. R. 63, 98 Fed. Rep. 76; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147.

not, however, include a levy upon a judgment of foreclosure of a lien which affects only the property bound by the lien,[16] or a landlord's levy under a distress warrant,[17] or proceedings under a state statute for the dissolution of a corporation or partnership and the appointment of a receiver to wind up its affairs and distribute its assets.[18] It will be observed in these last two proceedings no preference is given to any one creditor over the others. If such proceedings should create a preference an act of bankruptcy is committed.[19]

The preference must have been acquired within four months.[20] The four months' period begins to run from five days before the date of sale if at the time the bankrupt had failed to dissolve the levy.[21]

§ 54. Fourth: Assignments for the benefit of creditors and receiverships.

An act of bankruptcy by a person may consist of his having made a general assignment for the benefit of creditors,[1] or

[16] *In re* Chapman, 99 Fed. Rep. 395, 3 Am. B. R. 607; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717; *In re* Mero, 128 Fed. Rep. 630, 12 Am. B. R. 171.

[17] *In re* Belknap, 129 Fed. Rep. 646, 12 Am. B. R. 326.

[18] *In re* Empire Metallic Bedstead Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 3 Am. B. R. 575, 2 N. B. N. 304; *In re* Harper Bros., 100 Fed. Rep. 266, 2 N. B. N. 605, 3 Am. B. R. 804; Vacarro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 2 N. B. N. 1037, 4 Am. B. R. 474. Receivership proceedings are now made an act of bankruptcy under Sec. 3*a*, cl. 4. 32 Stat. at L. 797.

[19] *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

[20] *In re* Ferguson, 95 Fed. Rep. 429, 2 Am. B. R. 586; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330; 3 Am. B. R. 220; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717; Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 10 Am. B. R. 329; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147.

[21] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; *In re* National Hotel and Café Co., 138 Fed. Rep. 947, 15 Am. B. R. 69; *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123.

[1] B. A. 1898, Sec. 3, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L. 797; West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re* Gutwillig, 90 Fed. Rep. 475, s. c. 92 Fed. Rep. 337, 1 Am. B. R. 388.

being insolvent, applied for a receiver or trustee for his property, or because of insolvency the receiver or trustee has been placed in charge of his property under the laws of a state, of a territory, or of the United States.[2]

Whether an assignment for the equal benefit of all creditors constituted in itself an act of bankruptcy under the act of 1867 was the cause of much discussion. There is great conflict in the reported opinions of the district and circuit courts on this subject. Some of them held that it was a transfer with intent to hinder, delay or defraud creditors. Others held otherwise. Undoubtedly such an assignment was made an act of bankruptcy in the present statute for the purpose of definitely settling the question.

Such assignments are not in themselves objectionable, and can be set aside only when they fall within the provisions of the act.[3] Whether fraudulent under the act or not, it is in itself an act of bankruptcy which will support an adjudication, and this is true whether the assignor is solvent or insolvent.[4] An assignment which is void under the state law so that it cannot be enforced is an act of bankruptcy.[5] So also a deed of assignment which is defectively executed may constitute an act of bankruptcy.[6] It has been held that a deed of assignment which is not stamped in accordance with the revenue law cannot be offered in evidence.[7] It has been held that a confession of judgment by a debtor to a trustee for all his creditors amounts to a general assignment for the

[2] B. A. 1898, Sec. 3*a*, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[3] See Fraudulent Conveyances, Chap. XVII; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; Randolph v. Scrugg, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[4] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; Day v. Beck & Gregg Hardw. Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 8 Am. B. R. 175; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381. See also Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[5] *In re* Mendelsohn, No. 9420 Fed. Cas., s. c. 3 Saw. 342.

[6] *In re* Lawrence, No. 8133 Fed. Cas., s. c. 10 Ben. 4. But see Dutton v. Morrison, 17 Ves. 193.

[7] *In re* Dunham, No. 4143 Fed. Cas., s. c. 2 Ben. 488. But see Ponsford v. Walton, 3 L. J. C. P. Cas., 167.

benefit of creditors, under the law of Pennsylvania, and constitutes an act of bankruptcy.[8] Where the property of a private banking partnership is in charge of a special agent in a state proceeding to wind up its affairs, and the insolvent partners transfer their individual property in trust for the payment of firm debts, the legal effect is a general assignment for the benefit of creditors and constitutes an act of bankruptcy.[9]

A direct transfer to creditors without the intervention of a trustee has been held not to be an assignment for the benefit of creditors.[10]

Appointment of a Receiver as an Act of Bankruptcy.—The fact that a receiver had been put in charge of a debtor's property does not constitute an assignment for the benefit of creditors and was not an act of bankruptcy under the original act.[11] The amendment of 1903 added to the fourth act of bankruptcy, relating to assignments for the benefit of creditors, two new grounds or acts of bankruptcy: *first,* where an insolvent applied for a receiver or trustee for his property; or, *second,* because of insolvency a receiver or trustee has been placed in charge of his property.[12]

The fact that a receiver or trustee has been appointed and put in charge of the property is not in itself an act of bankruptcy. Insolvency of the debtor at the time is essential. The receiver or trustee must have been appointed at the request of an insolvent,[13] or have been appointed because of the insolvency of the person, corporation or partnership of whose property the receiver or trustee is put in charge.[14] It is not

[8] *In re* Green, 106 Fed. Rep. 313, 5 Am. B. R. 848.

[9] *In re* Salmon & Salmon, 143 Fed. Rep. 395, 16 Am. B. R. 122.

[10] Anniston Iron & Supply Co. v. Rolling Mill Co., 125 Fed. Rep. 974, 11 Am. B. R. 200.

[11] *In re* Burrell (C. C. A. 2d Cir.), 123 Fed. Rep. 414, 9 Am. B. R. 625; Vaccaro v. Security Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474; *In re* Empire, etc., Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 3 Am. B. R. 575; *In re* Harper Bros., 100 Fed. Rep. 266, 3 Am. B. R. 804.

[12] B. A. 1898, Sec. 3, clause 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[13] Moss Nat. Bank v. Arend (C. C. A. 6th Cir.), 146 Fed. Rep. 351.

[14] *In re* Spalding (C. C. A. 2d

sufficient that a receiver was appointed on account of breaches of covenants [15] or because the debtor was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors.[16] It has been held that to continue a receiver in charge after the amendment was not an act of bankruptcy, where he was appointed before the amendment.[17] It is immaterial whether the receiver is a temporary or permanent receiver.[18] It is not necessary that the trustee should be appointed by a court.[19]

If the order appointing the receiver or trustee recites the grounds for putting a receiver or trustee in charge of the property the recital cannot be contradicted without impeaching the record, and this is not admissible.[20] If the court appointed the receiver without reciting the grounds of its judgment, the record may be referred to for grounds shown by evidence *aliunde*.[21]

§ 55. Fifth: Voluntary petition.

An act of bankruptcy by a person may consist of his having admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.[1]

Cir.), 139 Fed. Rep. 244, 14 Am. B. R. 129; Blue Mt. ron & Steel Co. v. Portner, 131 Fed. Rep. 57, 12 Am. B. R. 559; *In re* Douglass Coal & Coke Co., 131 Fed. Rep. 769, 12 Am. B. R. 539; Hooks v. Aldridge (C. C. A. 5th Cir.), 145 Fed. Rep. 865; Zugalla v. International Mercantile Agency, 142 Fed. Rep. 927, 16 Am. B. R. 67; *In re* International Coal Mining Co., 143 Fed. Rep. 665, 16 Am. B. R. 309.

[15] *In re* Douglass Coal & Coke Co., 131 Fed. Rep. 769, 12 Am. B. R. 539.

[16] *In re* Spalding (C. C. A. 2d Cir.), 139 Fed. Rep. 244, 14 Am. B. R. 126.

[17] Seaboard Steel Casting Co. v. Trigg, 124 Fed. Rep. 75, 10 Am. B. R. 594.

[18] Blue Mt. Iron & Steel Co. v. Portner, 131 Fed. Rep. 57, 12 Am. B. R. 559.

But see Zugalla v. International Mercantile Agency, 142 Fed. Rep. 927, 16 Am. B. R. 67.

[19] *In re* Hercules Atkin Co., 133 Fed. Rep. 813, 13 Am. B. R. 369; *In re* Bennett Shoe Co., 140 Fed. Rep. 687, 15 Am. B. R. 497.

[20] *In re* Spalding (C. C. A. 2d Cir.), 139 Fed. Rep. 244, 14 Am. B. R. 129; *In re* Watts, 190 U. S. 1, 35, 47 L. Ed. 933, 10 Am. B. R. 113.

[21] Blue Mt. Iron & Coal Co. v. Portner, 131 Fed. Rep. 57, 12 Am. B. R. 557; Hooks v. Aldridge (C. C. A. 5th Cir.), 145 Fed. Rep. 865.

[1] B. A. 1898, Sec. 3, clause 5; *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

This is the act of bankruptcy upon which an adjudication in voluntary bankruptcy is founded. It is not necessary that the petition be filed in court. All that is required is that it be written and signed by the bankrupt. The admission in a letter by a debtor that he cannot pay his debts and is willing to be declared a bankrupt would undoubtedly be sufficient to constitute an act of bankruptcy under this provision. Whether a debtor can make a legal contract not to make such a declaration in writing may be doubted.[2] In cases of involuntary proceedings under this section the actual solvency of the defendant is no defense.[3]

A corporation can be adjudged a bankrupt upon a petition filed by its creditors, and founded upon an admission in writing to creditors of its insolvency and willingness to be adjudge a bankrupt.[4] This cannot be done where the admission is made by the directors, who, by the state corporation laws, have no authority to make such an admission.[5] Such a statement can not be made after the petition is filed.[6] The petition will not be heard until the other creditors have been notified,[7] and if there is such collusion as to amount to a fraud on the act it will be denied.[8]

§ 56. Computing time.

Proceedings must be instituted within four months after an act of bankruptcy is committed.[1]

[2] See Hill v. Cowery, 25 L. J. Ex. 285.

[3] *In re* C. Moench & Sons Co., 130 Fed. Rep. 685, 10 Am. B. R. 656; West Co. 1 Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[4] *In re* C. Moench & Sons Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 12 Am. B. R. 240, Affirming 123 Fed. Rep. 965, 10 Am. B. R. 656; *In re* Mutual Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Marine Machine and Conveying Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; *In re* International Coal Mining Co., 143 Fed. Rep. 665, 16 Am. B. R. 309; *In re* Duplex Radiator Co., 142 Fed. Rep. 906, 15 Am. B. R. 324.

[5] *In re* Bates Machine Co., 91 Fed. Rep. 625, 1 Am. B. R. 129.

[6] *In re* Baker-Ricketson Co., 97 Fed. Rep. 489, 4 Am. B. R. 605.

[7] *In re* Humbert, 100 Fed. Rep. 439, 4 Am. B. R. 76.

[8] *In re* Independent Thread Co., 113 Fed. Rep. 998, 7 Am. B. R. 704.

[1] B. A. 1898, Sec. 3*b*.

Such time does not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted.[2] If the state statute provides for recording or registering the four months period will not begin to run until the paper is actually filed for record. The words "or permitted" are omitted in the section 60*b* relating to voidable preferences.[3] If registering or recording is not required or permitted, the four months' period begins to run from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[4]

Where the act of bankruptcy is created by legal proceedings the four months' period begins to run from five days before the date of sale if at that time the bankrupt had failed to dissolve it.[5]

In computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[6] Holidays are defined by the act to include Christmas, the

[2] B. A. 1898, Sec. 3*b*. *In re* Mingo Valley Creamery Ass., 100 Fed. Rep. 282, 4 Am. B. R. 67.

[3] For a history of the amendment of 1903 and its effect, see *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416, and Loeser v. Bank (C. C. A. 6th Cir.), 148 Fed. Rep. ——. See Sec. 194*d*, *post*.

[4] *In re* Bogen, 134 Fed. Rep. 1019, 13 Am. B. R. 529. B. A. 1898, Sec. 3*b*.

[5] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220, 2 N. B. N. 174; Owen v. Brown (C. C. A 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717; *In re* National Hotel & Café Co., 138 Fed. Rep. 947, 15 Am. B. R. 69; *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123.

[6] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; Jones v. Stephens, 94 Me. 582, 5 Am. B. R. 571; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480.

fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving.[7]

[7] B. A. 1898, Sec. 1, clause 14.

CHAPTER IX.

PROCEEDINGS IN VOLUNTARY BANKRUPTCY.

§ 57. Who may file a voluntary petition.

The statute declares that any qualified person may file a petition to be adjudged a voluntary bankrupt.[1] Any person who owes debts, except a corporation, is entitled to the benefits of the statute as a voluntary bankrupt.[2] A person is defined by the act itself to include partnerships and women.[3] It would therefore appear that any natural person or association of persons, not incorporated, irrespective of trade, business or profession, may file a petition to be adjudged a voluntary bankrupt.[4]

A person, however, who wishes to file a petition must have certain qualifications before he can do so. He must owe debts, but no limit is fixed to the amount of the debts.[5] It has been held that a person owing one debt only and having no assets may file a petition,[6] unless that debt be one not provable or not released by a discharge.[7] He must also have had his principal place of business, resided or had his domicile within the United States for the period of six months, or the greater portion thereof, or if he has not had his principal place of

[1] B. A. 1898, Sec. 59*a*. Compare R. S. Sec. 5014.

[2] B. A. 1898, Sec. 4. See Who may be voluntary bankrupts, Sec. 41, *ante*. As to corporations, see Sec. 48, *ante*.

[3] B. A. 1898, Sec. 1, clause 19.

[4] As to the right of an alien, an infant, a lunatic and a married woman to be adjudged bankrupts, see Secs. 44 to 47, *ante*.

[5] B. A. 1898, Sec. 4. Under the act of 1867, R. S. Sec. 5014, a person was required to owe debts, provable in bankruptcy, exceeding the sum of $300.

[6] *In re* Schwaninger, 144 Fed. Rep. 555, 16 Am. B. R. 427.

[7] *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; *In re* Colaluca, 133 Fed. Rep. 255, 13 Am. B. R. 292; *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

business, resided or had his domicile within the United States, he must have had property within the jurisdiction of a court of bankruptcy, or have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have property within jurisdiction of a court of bankruptcy.[8] A state court has no power to enjoin a debtor from applying to a court of bankruptcy to be adjudged a voluntary bankrupt, and to obtain the benefit of the statute.[9]

There was a difference of opinion under the former bankrupt acts with reference to the right of a person to file a voluntary petition after an involuntary petition had been filed against him. It was held that the pendency of a creditors' petition, on which no decree of bankruptcy had been granted, was not a bar to the right of voluntary petition.[10] It was also held that in such cases the voluntary petition was nugatory and void, and would be set aside on motion.[11] Under the present act where a voluntary petition is filed after involuntary proceedings are begun it should not in all cases be either granted or stayed until the involuntary proceedings are disposed of, but notice should be given to the creditors who filed the involuntary petition and such action taken as is for the best interest of the estate.[12] If the voluntary proceedings are not stayed the rights of the creditors should be protected.[13] The court may consolidate the two proceedings.[14] The statute does not forbid a debtor who has made an assignment for the benefit of his creditors in the state court to subsequently file a petition to be adjudged a voluntary bankrupt.[15] If one peti-

[8] B. A. 1898, Sec. 2, clause 1. See Sec. 58, *post*.

[9] Fillingin v. Thornton, 49 Ga. 384.

[10] *In re* Flanagan, No. 4850 Fed. Cas., s. c. 5 Saw. 312; *In re* Canfield, No. 2380 Fed. Cas., s. c. 5 Law Rep. 415.

The same rule was recognized in *In re* Davidson, No. 3599 Fed. Cas., s. c. 4 Ben. 10, although the question does not seem to have been raised in that case.

[11] *In re* Stewart, No. 13419 Fed. Cas., s. c. 3 N. B. R. 108.

[12] *In re* Dwyer, 112 Fed. Rep. 777, 7 Am. B. R. 532; *In re* Waxelbaum, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re* Stegar, 113 Fed. Rep. 978, 7 Am. B. R. 665.

[13] *In re* Stegar, 113 Fed. Rep. 978, 7 Am. B. R. 665.

[14] *In re* Knight, 125 Fed. Rep. 35 at 37, 11 Am. B. R. 1.

[15] This was done *In re* Dunbar, in the district court for the south-

tion has been filed and proceedings had thereon, the petitioner may subsequently file a second petition,[16] irrespective of whether he obtained or was refused a discharge in the former proceedings. But it has been held that a person is not entitled to file a second petition for the sole purpose of obtaining a discharge, when he has failed to apply for one in season or has been refused a discharge in a former proceeding.[17]

§ 58. In what court the petition is to be filed.

The debtor may file his petition in the court of bankruptcy for the district in which he has had his principal place of business, resided or had his domicile for the greater portion of the preceding six months.[1]

Where the debtor has had his domicile, resided and had his principal place of business in the same district there is but one court in which he can file his application. Where he has resided or had his domicile in one district and his principal place of business in another he has an election, and may make his application in either district. If it is conceived that a debtor may have a domicile in one district and reside in another,[2] he may have an election of three districts within which to institute voluntary proceedings, namely, the district of his residence, the district of his domicile or the district in which he has had his principal place of business.

ern district of Ohio, 1899 (not reported). The question of his right to do so was not raised. Both the court and counsel appear to have assumed that such a right existed.

[16] *In re* Little (C. C. A. 7th Cir.), 137 Fed. Rep. 521, 13 Am. B. R. 640; *In re* Drisko, No. 4090 Fed. Cas., s. c. 2 Low. 430; Fisher v. Currier, 7 Met. (Mass.) 424.

See also R. S. Sec. 5116, which provided that under the act of 1867 a second discharge should not be granted a bankrupt unless his estate should be sufficient to pay 70 per centum, or three-fourths of his creditors consented to it. No such provision is contained in the present act.

[17] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 506; *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595.

[1] B. A. 1898, Sec. 2.

[2] *In re* Williams, 99 Fed. Rep. 544, 3 Am. B. R. 677; the bankrupt had resided abroad for many years. Judge Hanfords said: "Under the law, as I find it declared by the highest court of this country, the petitioner did not change his domi-

Where a debtor has several places of business in different districts he must file his petition in the district in which he has his principal place of business. This limits his right to file a petition on this ground of jurisdiction to one district. The phrase "principal place of business" implies that the debtor is carrying on what is commonly known as business, as distinguished from other vocations or employment. He must provide the money that is needed or have an interest in the business by contributing his labor, or, if the capital is borrowed, the business must be done in the debtor's name. Thus it may be doubted if a debtor is entitled to claim a place of business where he merely superintends the business of another or is employed as a clerk,[3] or where he is engaged in winding up the affairs of an insolvent concern to which he belonged,[4] or where he is engaged in any vocation not properly included in the word business. Where the bankrupt claims to have changed his place of business a short time before filing a voluntary petition the burden is on him to prove it.[5]

The time during which the debtor has had his principal place of business, resided or had his domicile in the district must also be considered. Where he has had his principal

cile when he went to British Columbia in 1893, nor afterwards because he did not have the intention to remain there, and he did have a definite intention to return to this state. The order made by the referee that the petition be dismissed will be vacated, and the case will proceed in the usual course."

Consult *in re* Watson, No. 17272 Fed. Cas., s. c. 4 N. B. R. 613; *In re* Walker, No. 17061 Fed. Cas., s. c. 1 Low. 237; *In re* Kinsman, No. 7832 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 309; Stiles v. Lay, 9 Ala. 795; Penfield v. C. & O. R. Co., 29 Fed. Rep. 494; Chambers v. Prince, 75 Fed. Rep. 176; Krone v. Cooper, 43 Ark. 547; Tipton v. Tipton, 87 Ky. 243; Rhodes v. Farish, 16 Mo. App. 434; Tazewell County v. Davenport, 40 Ill. 197; Dorsey v. Kyle, 30 Md. 512; Wheeler v. Cobb, 75 N. C. 21.

As to what is a domicile, see Sec. 177, "Domicile of Bankrupt," *post.*

[3] *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Magie, No. 8951 Fed. Cas., s. c. 2 Ben. 369; *In re* Kinsman, No. 7832 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 309.

[4] *In re* Little, No. 8391 Fed. Cas., s. c. 3 Ben. 25.

[5] *In re* Waxelbaum, 2 N. B. N. 103, 3 Am. B. R. 267, 97 Fed. Rep. 562.

place of business, resided or had his domicile within the district during the whole period of the six months immediately preceding his application no question can arise. Where he has had his principal place of business, resided or had his domicile (according to the ground of jurisdiction on which he claims) in different districts during such six months, then the petition must be filed in the district in which he has had his principal place of business, resided or had his domicile for the greater portion of six months, or for more than three months. If he has not had a principal place of business, resided or had a domicile for more than three months in any district, he is not ordinarily entitled to file a petition to be adjudged a voluntary bankrupt.

In case the debtor has not had a principal place of business, resided or had a domicile within the United States, but is entitled to the benefits of the statute under section 2, he must file his petition in the district within which he has property. If he has property in more than one district, he may elect in which of such districts to institute proceedings in voluntary bankruptcy.

The questions relating to who may file a voluntary petition and in what court he is entitled to make his application to be adjudged a voluntary bankrupt are jurisdictional. If the court does not obtain jurisdiction over the person of the debtor in the manner prescribed by the statute the proceedings are void. A creditor may have such proceedings discontinued at any time upon petition filed for that purpose,[6] or may defeat an application for discharge by showing that court has no jurisdiction of the case.[7] If the petition shows jurisdiction, creditors will be held to waive this objection unless it is taken

[6] *In re* Waxelbaum, 98 Fed. Rep. 589, 3 Am. B. R. 392, 2 N. B. N. 228; s. c. 97 Fed. Rep. 562; *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Mason, 99 Fed. Rep. 256, 2 N. B. N. 425, 3 Am. B. R. 509; *In re* Goodfellow, No. 5536 Fed. Cas., s. c. 1 Low. 510; *In re* Walker, No. 17061 Fed. Cas., 1 Low. 237.

[7] *In re* Penn, No. 10926 Fed. Cas., s. c. 4 Ben. 99; *In re* Little, No. 8391 Fed. Cas., s. c. 3 Ben. 25; Jobbins v. Montague, No. 7330 Fed. Cas., s. c. 6 N. B. R. 509; Stiles v. Lay, 9 Ala. 795.

promptly.[8] If the jurisdictional requisites existed at the time the petition is filed the petitioner will ordinarily be permitted to amend his petition to show them.

When proceedings have been commenced by a debtor in one district he is not entitled to institute similar proceedings in other districts. The jurisdiction is exclusive in the court where it first attaches.[9]

§ 59. The petition.

The application for the benefit of the bankrupt statute is made by petition.[1] A schedule of the debtor's property, list of his creditors and claim for exemptions are required to be filed with the petition.[2]

The petition should be entitled in the court for the proper district. It is regularly addressed to the judge of the district by name, as "To the Hon. A. B., judge of the district court of the United States for the —— district of ——."

The petition should set forth the petitioner's name in full and his place of residence. It should allege that he has had his principal place of business, resided or had his domicile (as may be) within the district for the preceding six months or the greater portion thereof. This averment is jurisdictional and necessary. It should also aver that he is unable to pay all of his debts; that he is willing to be adjudged a bankrupt, to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the statute.

The petition should be signed by the petitioner and be verified under oath,[3] which includes an affirmation.[4] The oath or affirmation may be administered by a referee, an officer

[8] *In re* Mason, 99 Fed. Rep. 256, 2 N. B. N. 425, 3 Am. B. R. 599. Consult Allen v. Thompson, 10 Fed. Rep. 116.

[9] *Ex parte* Hall, No. 5919 Fed. Cas., s. c. 5 Law Rep. 269.

[1] B. A. 1898, Sec. 59*a*. Official Form No. 1, Form No. 1. *post*.

[2] B. A. 1898, Sec. 7, clause 8. See also "Schedules," Sec. 60 *post*.

[3] B. A. 1898, Sec. 18*c*. Official Form No. 1, Form No. 1, *post*. *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387.

[4] B. A. 1898, Sec. 1, clause 17, and Sec. 20*b*.

authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken, or a diplomatic or consular officer of the United States in any foreign country.[5]

The supreme court has provided a form for petitions which should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[6] Printed blanks may usually be had from dealers in law stationery. All the petitions and schedules filed therewith must be printed or written out plainly without abbreviation or interlineation, except where an abbreviation or interlineation may be for the purpose of reference.[7] Under the act of 1867 it was held that dots could not be used to indicate anything which was necessary to be stated.[8]

The petition should be endorsed with the style of the court, the name of the petitioner, and a brief statement of the character of the petition, as "Debtor's petition."

§ 60. Schedules.

It is the duty of the bankrupt to prepare, make oath to and file in court a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by

[5] B. A. 1898, Sec. 20. The verification may be taken before the attorney for the bankrupt as notary public. *In re* Kindt, 98 Fed. Rep. 403, 3 Am. B. R. 443.

[6] Gen. Ord. 38. See Official Form No. 1, Form No. 1, *post*.

[7] Gen. Ord. 5. Sutherland v. Lasher (N. Y. Sup. Ct.), 11 Am. B. R. 780. See also *In re* Malcolm, No. 8986 Fed. Cas., s. c. 4 Law Rep. 488; Anon. No. 458 Fed. Cas., s. c. 1 N. B. R. 216.

In Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770, Judge Purnell said: "Several proceedings of late have made necessary the adoption of a rule, which will be enforced, that petitions in bankruptcy will not be filed or considered unless they are on the prescribed printed forms. Written or typewritten petitions and schedules will be returned to parties without action."

[8] *In re* Orne, No. 10582 Fed. Cas., s. c. 1 Ben. 420.

them, if any, and a claim for such exemptions as he may be entitled to.[1] The object of such schedule is to show the true condition of the bankrupt's affairs as clearly and lucidly as possible. Each debtor should prepare his schedule with this end in view. A voluntary bankrupt must file a schedule of this nature with his petition,[2] and an involuntary bankrupt must file such a schedule within ten days after the adjudication, unless further time is granted by the court.[2] The schedule in either case must be filed in triplicate, one copy for the clerk, one for the referee and one for the trustee.[2]

The supreme court of the United States has provided forms of schedules which should be observed and used with such alterations as may be necessary to suit the circumstances of each particular case.[3] The same form of schedule is used in voluntary and involuntary proceedings, and in proceedings to have a partnership declared bankrupt.[4]

The schedule required by the statute to be filed in court and the form provided by the supreme court are divided into two general parts. The first part, schedule A, is a list of creditors of the bankrupt, with the amount due each of them. The second part, schedule B, is a statement of all the property of the bankrupt. Each part is divided into separate classes, as set forth below. Each class is stated in detail in a separate paper prepared for that purpose. In classifying the creditors and the property the notes and instructions placed on each division of the forms should be carefully noted. All the separate forms prepared by the supreme court should be used in each case. If a debtor has no creditor or no property properly classified in a particular form he should so state the fact in that form; but he should not omit the form for the reason that he has no creditor or property properly classified under that

[1] B. A. 1898, Sec. 7, clause 8.

[2] B. A. 1898, Sec. 7, clause 8.

[3] Gen. Ord. 38. Official Form 1, schedules A and B; see Forms Nos. 2 and 3, *post*. Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770. See also *In re* Sallee, No. 12256 Fed. Cas., s. c. 2 N. B. R. 228.

[4] Consult Official Form No. 1, schedules A and B, and note at the ends of Official Forms Nos. 2 and 3. See Forms Nos. 2, 3, 4 and 5, *post*.

head. Each sheet or form should be signed by the debtor. At the end of schedule A and again at the end of schedule B the debtor must make oath in the form prescribed. When the parts of the schedule are completed they should be fastened neatly and firmly together and filed as one paper. This is "the schedule" of the statute. It consists of schedule A, schedule B and a summary of debts and assets taken from the statements of the debtor in these two parts of his schedule.

One copy of the schedule is referred to the referee as soon as may be after it is filed. It is the duty of the referee to examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended.[5] The referee's finding is not conclusive so as to preclude inquiry at the proper time and in a proper manner as to the sufficiency of the schedule.[6]

SCHEDULE A. A STATEMENT OF ALL DEBTS OF BANKRUPT.—Schedule A consists of five separate divisions, by means of which the creditors are divided into as many distinct classes. The *first division* is a list of all creditors who are to be paid in full, or to whom priority is secured by law. The *second division* is a list of creditors holding securities. The *third division* is a list of creditors whose claims are unsecured. The *fourth division* is a statement of the debtor's liabilities on notes or bills discounted, which ought to be paid by the drawers, makers, acceptors or endorsers. The *fifth division* is a statement of the bankrupt's liability on accommodation paper. In classifying the debts the notes and instructions placed on each division of the forms should be carefully noted.

In schedule A the debtor should set forth a full and true list of his creditors, showing their residences, if known, if unknown, that fact should be stated, the amount due each of them, the consideration therefor, and the security held by them, if any.[7] The statement of the debts should be full and

[5] B. A. 1898, Sec. 39, clause 2.

[6] *In re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321.

[7] B. A. 1898, Sec. 7, clause 8; Official Form No. 1, schedule A; see Form No. 2, *post*.

That abbreviations must not be used, see Sutherland v. Lasher (N. Y. Sup. Ct.), 11 Am. B. R. 780; Haack v. Theise 51 N. Y. Mis. 3, 16 Am. B. R. 699.

accurate, as the debtor may not otherwise be able to obtain a discharge.[8] It is better practice to include debts, although barred by the statute of limitations.[9] The amount and date of the debt is sufficient without the computation of interest, for the exact amount can be ascertained at any stage of the proceedings.[10] Where a note has been given or judgment rendered on the note, or in case there is a person jointly liable for the debt, this fact should be stated.[11] Where the creditor is a copartnership the name of the firm and not of the individual partners is proper.[12] Where the debt is due a newspaper the names of the proprietors should be given and not the name of the newspaper only.[13]

SCHEDULE B. STATEMENT OF ALL PROPERTY OF BANKRUPT.—Schedule B consists of six separate divisions. The *first division* is a statement of all the real estate of the bankrupt, together with its location, description, encumbrances and value.[14] The *second division* is an itemized statement of the personal property of the bankrupt, together with the value thereof.[15] The *third division* is a statement of all choses in action in which the bankrupt has an interest. The *fourth division* is a statement of all property in reversion, remainder

[8] *In re* Kalish, No. 7599 Fed. Cas., s. c. Deady 575; *In re* Whetmore, No. 17508 Fed. Cas., s. c. Deady 585; *In re* Redfield, No. 11624 Fed. Cas., s. c. 2 Ben. 71; *In re* Cushman, No. 3512 Fed. Cas., s. c. 7 Ben. 482.

[9] *In re* Kingsley, No. 7819 Fed. Cas., s. c. 1 Low. 216; *In re* Ray, No. 11589 Fed. Cas., s. c. 2 Ben. 33; *In re* Cushman, No. 3512 Fed. Cas., s. c. 7 Ben. 482; *In re* Harddin, No. 6048 Fed. Cas., s. c. 1 N. B. R. 395.

[10] *In re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321.

[11] *In re* Orne, No. 10582 Fed. Cas., s. c. 1 Ben. 420.

[12] Anon., 457 Fed. Cas., s. c. 1 N. B. R. 122.

[13] Anon., 462 Fed. Cas., s. c. 2 N. B. R. 141.

[14] The name of the town, county and state and the grantor were held sufficiently accurate *in re* Dodge, No. 3946*a* Fed. Cas., but a description as "an interest in half a lot in Buffalo," is not. *in re* Frisbee, No. 5130 Fed. Cas., s. c. 4 Law Rep. 483.

[15] See *In re* Hill, No. 6481 Fed. Cas., s. c. 1 Ben. 321; *In re* Malcom, No. 8986 Fed. Cas., s. c. 4 Law Rep. 488.

An interest in the net profits of a business as additional compensation need not be scheduled. *In re* Brown, No. 1978 Fed. Cas., s. c. 5 Law Rep. 121.

or expectancy, including property held in trust for the debtor or subject to any power or rights to dispose of or charge it. In this form is included also property theretofore conveyed for the benefit of creditors and money paid counsel for services rendered or to be rendered in bankruptcy. The *fifth division* is a particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation, and if any portion of it is real estate, its location, description and present use should be stated.[16] The *sixth division* is a complete list of all books, papers, deeds, rights, etc., relating to the business dealings, estate and effects of the bankrupt.

The object of schedule B is to set forth a complete statement of all the property of the debtor, including such property as he claims to be exempted under the laws of the state of his domicile. All his property not exempted by statute passes to the trustee for the benefit of his creditors.[17] All such property must be set forth in the schedule. It is not necessary to repeat at length what property so passes to the trustee, for this is the subject of a separate chapter.[18]

§ 61. Of filing the petition and schedules.

The petition and schedule must be filed in the office of the clerk of a court of bankruptcy, and not with a referee or judge.[1]

The statute provides that the petition shall be in duplicate, one copy for the clerk and one for service on the bankrupt.[2] In voluntary bankruptcy it would seem that one copy of the petition is all that is required. It is not necessary to serve on the bankrupt a copy of his own petition. Three copies of the schedule are required to be filed, one copy for the clerk, one for the referee, and one for the trustee.[3]

[16] See exceptions, Chap. XVII.
Military uniforms, arms and equipments are exempted by R. S. Sec. 1628.

[17] B. A. 1898, Sec. 70.

[18] Chap. XVI.

[1] See *In re* Sykes, 106 Fed. Rep. 669, 6 Am. B. R. 264.

[2] B. A. 1898, Sec. 59*c*.

[3] B. A. 1898, Sec. 7, clause 8.

As soon as the petition and schedules are deposited with the clerk, he endorses on each paper the day and hour of filing.[4] He thereupon enters the case upon a docket which is kept for that purpose, together with a memorandum of the filing of the petition.[5] The cases are entered and numbered in the order in which they are commenced.[5] He also makes a similar endorsement upon any subsequent paper filed with him, except such papers as have been previously filed with the referee.[6] The papers in each case should be kept in a file by themselves.

At the time of filing the petition the petitioner must deposit $30 with the clerk as costs in the case. Of this amount the clerk is to receive $10, the referee $15, and the trustee $5. Where a partnership files a voluntary petition in which the individual partners join, it is a single proceeding and only one deposit fee of thirty dollars is required.[7] Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.[8] Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.[8]

No deposit is required upon the filing of a petition by a voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, money with which to pay such fees.[9] In such cases the bankrupt is permitted to proceed *in forma pauperis*. But the judge, at

[4] Gen. Ord. 2.

This is conclusive of the particular time at which the papers were filed. Ala. & C. R. Co. v. Jones, No. 127 Fed. Cas., s. c. 7 N. B. R. 145.

[5] Gen. Ord. 1.

[6] Gen. Ords. 1 and 2.

[7] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Langslow, 98 Fed. Rep. 869, 3 Am. B. R. 529*n*; but see *In re* Barden, 101 Fed. Rep. 553, 4 Am. B. R. 31.

[8] Gen. Ord. 10.

[9] B. A. 1898, Sec. 51, clause 2; *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

any time during the pendency of the proceedings in bankruptcy, may order the regular fees to be paid out of the estate; or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[10]

The practice with reference to procedure *in forma pauperis* is not uniform in the several districts. In some districts rules have been promulgated by the court. It has been held that a petitioner receiving thirty dollars per month was not entitled to proceed as a poor person.[11] A voluntary bankrupt is not required to make a deposit of his filing fee out of his exempt property and is not required to solicit gifts or loans from his friends for that purpose.[12] A bankrupt proceeding as a poor person is required in one district, at least, to make the deposit before he receives his discharge or show that "by reason of ill-health or circumstances of peculiar misfortune he is a worthy object of charity."[13] The statutory affidavit is *prima facie* evidence of the bankrupt's inability to make the deposit.[14] This may be contested and the bankrupt examined with reference to his individual means, earnings and circumstances.

The petition may be filed by the bankrupt in person in his own behalf, or he may appear and conduct the proceedings by attorney, who must be an attorney or counsel or authorized to practice in the circuit or district court.[15] The name of the attorney or counselor, with his place of business, should be entered upon the docket with the date of the entry.[15]

§ 62. The order of adjudication and reference.

The judge of the court of bankruptcy regularly hears a voluntary petition and makes the adjudication or dismisses the

[10] Gen. Ord. 35.

[11] *In re* Collier, 93 Fed. Rep. 191, 1 Am. B. R. 182.

[12] Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529. But see *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[13] *In re* Fees Payable by Voluntary Bankrupt, 95 Fed. Rep. 120. But see *In re* Plimpton, 103 Fed. Rep. 775, 4 Am. B. R. 614.

[14] *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[15] Gen. Ord. 4.

petition.[1] No answer by the creditors will be permitted.[2] Where one partner files a voluntary petition to have the partnership adjudged a bankrupt, another partner can resist it the same as if it were involuntary,[3] but a creditor can not.[4]

When the petition does not show jurisdiction, or is not regularly filed, or is materially defective, the court may dismiss it or permit an amendment thereto.[5] No notice is required to creditors before making the order adjudicating the petitioner a bankrupt. It is an *ex parte* proceeding. This order is merely a judicial finding that the petitioner has become a bankrupt; that is, that he has previously committed an act of bankruptcy. The filing of the petition by a debtor is such an act of bankruptcy.[6] The order of adjudication, unless set aside by a judge or by an appellate court, is conclusive upon the insolvency of the debtor, his willingness to surrender his property and his desire to take the benefit of the statute.[7] But it may be contested upon any other fact which goes to defeat the jurisdiction of the court.[8]

At the time of making the order adjudging the petitioner a bankrupt the court regularly refers[9] the case for subsequent proceedings to a referee within the county of which the debtor

[1] B. A. 1898, Sec. 18*g*; Official Forms Nos. 11 and 12, Forms Nos. 28 and 29, *post*.

[2] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498; *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692; *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

It has been held that where a person manifestly able to pay his debts, files a voluntary petition in order to embarrass a particular creditor adjudication on such a petition may be set aside by the creditor as being a fraud on the act. *In re* Carleton, 115 Fed. Rep. 246 at 250, 8 Am. B. R. 270 at 274.

[3] Gen. Ord. 8; *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[4] *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

[5] Gen. Ord. 11.

[6] B. A. 1898, Sec. 3, clause 5.

[7] *In re* Fowler, No. 4998 Fed. Cas., s. c. 1 Low. 161.

[8] *In re* Goodfellow, No. 5536 Fed. Cas., s. c. 1 Low. 510; *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69; *In re* Scott, 111 Fed. Rep. 144, 7 Am. B. R. 39; *In re* Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re* Waxelbaum, 97 Fed. Rep. 562, 3 Am. B. R. 267. See *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692.

[9] Official Form No. 14, Form No. 31, *post*.

is a resident. He may refer the case to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[10]

All the proceedings thereafter, except such as are required by the statute or by the general orders to be had before the judge, are had before the referee.[11]

Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, must be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.[12]

The order referring a case to a referee should name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order must forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court.[13] The time when and the place where the referee shall act upon the matters arising under the several cases referred to him shall be fixed by special order of the judge, or by the referee, and at such times and places the referee may perform the duties which he is empowered by the act to perform.[13]

If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk forthwith refers the case to the referee.[14] In such cases the referee is authorized to consider the petition

[10] B. A. 1898, Sec. 22; *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868.

[11] Gen. Ord. 12. Gen. Ord. 27.

[12] Gen. Ord. 12. B. A. 1898, Sec. 38, clause 4, and Sec. 41.

[13] Gen. Ord. 12.

[14] B. A. 1898, Sec. 18g. Official Form No. 15, Form No. 32, *post*.

and make the adjudication or dismiss the petition [15] with the same effect as if it has been made by the judge. The referee is not authorized to make an adjudication in other cases.

§ 63. Amendments to petition and schedules.

The petitioner may conclude after his petition and schedules have been filed that they are defective, or may find that he has omitted something by mistake or inadvertence. In such case he may apply to the court for leave to amend. The court is expressly authorized to allow amendments to the petition and schedules upon the application of the petitioner.[1]

In his application for leave to amend the petitioner must state the cause of error in the paper originally filed.[2] The application may be by motion or petition. It should be accompanied with a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions and schedules.[2] The verification should be according to the circumstances of the amendment. The form will not be precisely the same as an oath to an original petition. If the amendments are made to separate schedules, the same must be made separately with proper references.[2] The amendment should state no more of the original paper than may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief subject of the amendment. The proceeding is *ex parte,* and no notice need be given to creditors, nor has any creditor the right to oppose it.[3] The granting or refusing to grant leave to amend the petition or schedules rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed.

Where the petition is referred to a referee to make the adjudication he may allow amendments to the petition. He

[15] B. A. 1898, Sec. 38, clause 1.
[1] Gen. Ord. 11.
[2] Gen. Ord. 11.
[2] Gen. Ord. 11.
[3] *In re* Watts, No. 17293 Fed. Cas., s. c. 3 Ben. 166; *In re* Heller, 41 Howard Prac. 213.

is expressly authorized, and it is his duty, to examine all schedules of property and lists of creditors filed by bankrupts, and to cause such as are incomplete or defective to be amended.[4] The referee may also refuse to allow an amendment. Whether he grants or refuses to permit an amendment to be made, the question is subject to be reviewed by the judge.[5]

§ 64. Dismissing a petition.

After a voluntary petition has been filed in court it can not be dismissed by the petitioner or petitioners for want of prosecution, or by the consent of parties until after notice to creditors.[1] The rule under the former acts seems to have been otherwise.[2] A voluntary bankrupt has been permitted to withdraw his petition on motion, where no creditors had proved claims or objected thereto.[3] Subsequent creditors, who have liens on after acquired property, can not be heard to object to such a dismissal.[3]

An adjudication of bankruptcy made *ex parte* on a voluntary petition is not conclusive on creditors, and they may, by petition, ask a dismissal of the proceedings.[4] A voluntary petition should be dismissed, when the debtor schedules no debt, which would be barred by a discharge,[5] or where the debtor changed his residence for the express purpose of filing a petition and with the intention of leaving the district as

[4] B. A. 1898, Sec. 39, clause 2; *In re* Brumelkamp, 95 Fed. Rep. 814, 2 Am. B. R. 318.

[5] Gen. Ord. 27.

[1] B. A. 1898, Sec. 59*g*.

[2] See *In re* Randall, No. 11550 Fed. Cas., s. c. 5 Law Rep. 115; *In re* Harris, No. 6110 Fed. Cas., s. c. 3 N. Y. Leg. Obs. 152; Dudley's case, No. 4114 Fed. Cas., s. c. 1 Pa. Law Jour. 302; *Ex parte* Bennett, No. 1309 Fed. Cas., s. c. 1 Pa. Law Jour. 145; *In re* Gile, No. 5423 Fed. Cas., s. c. Law Rep. 224.

[3] *In re* Hebbart, 104 Fed. Rep. 322, 5 Am. B. R. 8; but see *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847.

[4] *In re* Garneau (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 11 Am. B. R. 679.

[5] *In re* Maples, 105 Fed. Rep. 910, 5 Am. B. R. 426; *In re* Colaluca, 133 Fed. Rep. 255, 13 Am. B. R. 292; *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

soon as he had obtained a discharge, because the court has no jurisdiction of the proceedings in such a case,[6] or where the sole purpose is to enable the debtor to obtain a discharge, when he has failed to apply for one in season or has been refused a discharge in a former proceeding.[7]

It has been held that where a voluntary partnership petition has been filed by the firm and subsequently withdrawn in part and a new petition made including the individual schedules of the partners, the date of the filing was the date the later or amended petition was filed.[8]

§ 65. Proceedings subsequent to the adjudication.

Proceedings in voluntary bankruptcy subsequent to the order of adjudication and reference are not essentially different from the proceedings had upon an involuntary petition, or a petition for the purpose of having a partnership, or the members thereof, adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of a trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate will be considered hereafter under appropriate heads.

[6] *In re* Garneau (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 11 Am. B. R. 679.

[7] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595.

[8] *In re* Washburn, 99 Fed. Rep. 84, 3 Am. B. R. 585.

CHAPTER X.

PROCEEDINGS IN INVOLUNTARY BANKRUPTCY.

§ 66. Who may institute involuntary proceedings.

Proceedings in involuntary bankruptcy are instituted by a creditor or creditors filing a petition, praying that the debtor may be declared a bankrupt, and that his property may be distributed according to law. By creditor is meant anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[1]

Whether a person may be a petitioning creditor or not depends upon whether he has a claim provable in bankruptcy against the estate of the debtor.[2] If he has a provable claim, he may be a petitioning creditor.[3] If he has not a provable claim he can not properly join in bringing the petition.[4] Whether a claim is provable is determined by section 63*a*.[5] The debt of a petitioning creditor must have been created at the time the act of bankruptcy complained of was committed.[6]

The wife of the alleged bankrupt may be a petitioning creditor and may file a petition against her husband where there are less than twelve creditors.[7] Firm creditors may as such join in a petition against an individual member of the firm.[8]

[1] B. A. 1898, Sec. 1, clause 9.

[2] B. A. 1898, Sec. 59*b*.

[3] *In re* Rothenberg, 140 Fed. Rep. 798, 15 Am. B. R. 485; *In re* Grant Shoe Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 12 Am. B. R. 349.

[4] *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221; Beers v. Hamlin, 99 Fed. Rep. 695, 3 Am. B. R. 745.

[5] See Sec. 109, *et seq.*, *post*.

[6] *In re* Callison (C. C. A. 5th Cir.), 129 Fed. Rep. 201, 11 Am. B. R. 797.

[7] *In re* Novak, 101 Fed. Rep. 800, 4 Am. B. R. 311.

[8] *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626.

A person is entitled to be a petitioning creditor where he owns an unliquidated claim against the debtor which may be proved and liquidated under section 63*b*.[9] The owner of an unliquidated claim arising in tort can not be a petitioning creditor for the reason that a claim for damages in tort is not provable in bankruptcy.[10] A mere contingent liability is not such a claim as will entitle the owner to join in a petition.[11] If the obligation of the debtor is fixed, although not payable until some time in the future, the creditor may join in the petition to have the debtor adjudged a bankrupt.[12]

It has been held that a person who has received a preference voidable under section 60*b*, or to whom conveyances, transfers, assignments or encumbrances, void or voidable under section 67*e*, have been made or given cannot join in filing the petition.[13] The better rule is that such a creditor may be a petitioning creditor.[14] The reason is that section 59*g* prohibits the allowance of such claims until the creditor surrenders his preference or other advantage, which he has unlawfully obtained over the other creditors. It does not affect the probability of his claim, merely the allowance. He therefore falls within section 59*b*, which provides that "creditors who have provable claims" may be petitioning creditors.[15]

[9] *In re* Manhattan Ice Co. (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 8 Am. B. R. 569; *In re* Grant Shoe Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 12 Am. B. R 349.

[10] *In re* Brinckman, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425.

[11] *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221.

As to Contingent Debts, see Sec. 112, *post*.

[12] *In re* Rothenberg, 140 Fed. Rep. 798, 15 Am. B. R. 485.

[13] *In re* Rogers Milling Co., 102 Fed. Rep. 687, 4 Am. B. R. 540; *In re* Burlington Malting Co., 109 Fed. Rep. 777, 6 Am. B. R. 369; *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162; *In re* Fishblate Clothing Co., 125 Fed. Rep. 986, 11 Am. B. R. 204.

[14] *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 309; *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119; *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140; *In re* Herzikopf, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re* Vastbinder, 126 Fed. Rep. 417, 11 Am. B. R. 118.

[15] *In re* Girard Glazed Kid Co., 129 Fed. Rep. 841, 12 Am. B. R.

A petition in involuntary bankruptcy is regularly filed by three or more creditors who have provable claims against any person (including a corporation, partnership or a woman [16]) which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over.[17] In case all of the creditors of such person, corporation or partnership are less than twelve in number, then one of such creditors whose unsecured claim equals five hundred dollars may file a petition to have him adjudged a bankrupt.[18] Where there are more than twelve creditors three must join in filing the petition, although most of the twelve are creditors for nominal sums only and are induced not to join in the petition by the solicitation of the bankrupt.[19] This must be honestly done. The courts have refused to sanction a collusive scheme for the purpose of keeping alive the claims of twelve creditors so as to prevent proceedings in involuntary bankruptcy being instituted by one creditor,[20] or splitting up a claim, by assigning part of it, to make a sufficient number of petitioning creditors.[21]

In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, only the general or unsecured creditors are counted. Creditors holding claims which are secured or have priority are not counted in computing the number of creditors or the amount of their claims, unless the amount of such claims exceed the values of such securities or priorities, and then only for such excess.[22] Where a creditor has security

295, the payment was made to a petitioning creditor more than four months before petition was filed; B. A. 1898, Sec. 1, clause 19. Consult cases cited in last note above.

[16] B. A. 1898, Sec. 1, cl. 19.

[17] B. A. 1898, Sec. 59*b*.

[18] B. A. 1898, Sec. 59*d*.

[19] *In re* Brown, 111 Fed. Rep. 979, 7 Am. B. R. 102; but see Gage & Co. v. Bell, 124 Fed. Rep. 371, 10 Am. B. R. 696.

[20] Leighton v. Kennedy (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 12 Am. B. R. 229; *In re* Blount, 142 Fed. Rep. 263, 16 Am. B. R. 97; *In re* Independent Thread Co., 113 Fed. Rep. 998, 7 Am. B. R. 704.

[21] *In re* Tribelhorn (C. C. A. 2d Cir.), 137 Fed. Rep. 3, 14 Am. B. R. 491.

[22] B. A. 1898, Sec. 56*b*, and Sec. 59*b*.

or has received a preference he may make a voluntary surrender of it and prosecute a petition on the original debt.[23]

It has been held that creditors who have assented to a general assignment made by their debtor, and who therefore can not join in a petition in bankruptcy against him, are not to be counted, in determining the number of his creditors, and, if the creditors who have not assented are less than 12 in number, one of such creditors may file the petition.[24] It is the number of creditors at the date the petition is filed that determines whether one or three petitioning creditors are necessary.[25] If it appears from the answer that there are more than 12 creditors, the petition may be amended to allow other creditors to join in a petition by one to make the number sufficient.[26]

Creditors may be estopped by their own consent to an act from alleging it against their debtor as proof of an act of bankruptcy. A creditor, who assents to the making of an assignment or other conveyance, which, but for such consent, would be an act of bankruptcy, can not allege the same against his debtor to procure an adjudication. The ground of the rule is, that to allow him to do so would be inconsistent with good faith and fair dealing, encourage deceit and put it within the power of creditors to entrap the debtor by inducing him to commit acts apparently fraudulent as to them, which they intend afterwards to repudiate to his disadvantage. A person will not therefore be allowed to complain of an act of bankruptcy where he induced the act, or after its commission has so acted with degard to it that others have the right to act on the faith of its validity so far as his subseuent conduct can

[23] B. A. 1898, Sec. 59*g*; *In re* Marcer, No. 9060 Fed Cas., s. c. 6 N. B. R. 351; *In re* Hunt, No. 6882 Fed. Cas., s. c. 5 N. B. R. 433.

[24] *In re* Miner, 104 Fed. Rep. 520; 4 Am. B. R. 710; 2 N. B. N. 1073.

[25] Moulton v. Coburn (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 12 Am. B. R. 553; Leighton v. Kennedy (C. C. A. 1st Cir.), 129 Fed. Rep. 237, 12 Am. B. R. 229; *In re* Blount, 142 Fed. Rep. 263, 16 Am. B. R. 696.

[26] *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

effect it.[27] The mere fact of proving a claim in a state assignment proceedings is not of itself sufficient to estop a creditor from maintaining a petition against the debtor,[28] nor will the acceptance of the position of assignee by a person who is secretary of a corporation estop the corporation.[29] There is an exception where the act of bankruptcy committed is that covered by Sec. 3*a*, cl. 5 of the Bankrupt Act. In such a case the creditor is not trying to repudiate or set aside the act

[27] Simonson v. Sinsheimer (C. C. A. 6th Cir.), 95 Fed. Rep. 948; *In re* Romanow, 92 Fed. Rep. 510. 1 Am. B. R. 461; *In re* Miner, 104 Fed. Rep. 520, 4 Am. B. R. 710; 2 N. B. N. 1073; Durham Paper Co. v. Seaboard Knitting Mills, 121 Fed. Rep. 179, 10 Am. B. R. 29.

In Simonson v. Sinsheimer, *supra*, after reviewing the cases, the court said: "Coming to apply our conclusions to the case at bar, we can not doubt that the answer tendered made a case of estoppel against the petitioners. They are alleged to have become parties to the assignment proceedings, to have filed their claims under the assignment, to have requested a reference to pass upon the claims, the accounts of the assignee, and the questions of distribution. They waited three months and a half before filing their petition. By their acquiescence they certainly induced the assignors, the assignee, and the purchasers of the assets from the assignee to believe that they would not seek to set aside the assignment."

The case was reversed and remanded to the district court, where answer was filed and evidence taken. The court held that the evidence did not establish an estoppel and adjudged the respondents to be bankrupts (96 Fed. Rep. 579). This decree was affirmed on appeal by the circuit court of appeals for the sixth circuit (100 Fed. Rep. 426, 3 Am. B. R. 824).

See also on question of estoppel of petitioning creditors Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387; *In re* Curtis (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 2 Am. B. R. 226; affirming 91 Fed. Rep. 739, 4 Am. B. R. 17; *In re* C. Moench & Sons Co., 123 Fed. Rep. 965, 10 Am. B. R. 656, affirmed (C. C. A. 2d Cir.), 12 Am. B. R. 240, 130 Fed. Rep. 685; Moulton v. Coburn (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 12 Am. B. R. 553; Clark v. Henne & Meyer (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 11 Am. B. R. 583; Lowenstein v. McShane Mfg. Co., 130 Fed. Rep. 1007, 12 Am. B. R. 601; Woolford v. Diamond State Steel Co., 138 Fed. Rep. 582, 15 Am. B. R. 31.

[28] Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383, 1 N. B. N. 387; *In re* Curtis (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 2 Am. B. R. 226.

[29] *In re* Winston, 122 Fed. Rep. 187, 10 Am. B. R. 171.

done and therefore is not estopped though it was done at his solicitation.[30]

Creditors who were employed by the debtor at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, are not to be counted.[31] Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor and run downwards, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other." [32]

In order to institute proceedings in involuntary bankruptcy a petitioning creditor or creditors must have claims against the debtor, *first*, which are provable against his estate and unsecured, and, *second*, they must amount in the aggregate to five hundred dollars or over. When the proceedings are against a partnership these debts clearly must be partnership debts. Under all circumstances the debts must be provable against the estate of the bankrupt.

The amount of the claims of the petitioning creditors must amount in the aggregate to five hundred dollars or over.[33] Interest may be added in computing any of these amounts.[34] The creditor may purchase claims against the debtor in good faith for the purpose of enabling him to unite in the petition.[35] Creditors who have been paid by another creditor for the

[30] *In re* C. Moench & Sons Co., 132 Fed. Rep. 965, 10 Am. B. R. 656, affirmed (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 12 Am. B. R. 240.

[31] B. A. 1898, Sec. 59*c*.

[32] 2 Black. Com. 206; Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Addams, 45 Penn. St. 432.

[33] B. A. 1898, Sec. 59*b*.

[34] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832.

[35] *In re* Woodford, No. 17972 Fed. Cas., s. c. 1 Cin. Law Bul. 37; *Ex parte* Shouse, No. 12815 Fed. Cas., s. c. Crabbe 482.

purpose of inducing them to join in the petition and who no longer have any interest will not be allowed to join in the petition.[36] The amount at which the claim of the secured creditor is to be reckoned is for the amount the claim exceeds the value of the security or priority.[37]

Creditors of a bankrupt, who have proved claims against his estate, may file a second petition to have him again adjudicated a bankrupt to reach after acquired property, where a discharge was refused him in the first proceeding, if he has committed an act of bankruptcy within four months of the filing of the second petition. A second adjudication can not be had where the act complained of occurred more than four months before filing the second petition.[38]

§ 67. Against whom a petition may be filed.

To warrant or justify the institution of involuntary proceedings against a debtor, individual corporation or partnership, two things must concur with reference to such debtor: *First,* such debtor must be one who may be adjudged an involuntary bankrupt and be subject to the provisions and entitled to the benefits of the statute; *second,* he must have committed an act of bankruptcy within four months prior to the filing of the petition. If the act of bankruptcy alleged is that set forth in Sec. 3*a*, cl. 1 of the bankrupt act he must be insolvent at the time of filing the petition.[1]

The Debtor must be one who may be Adjudged an Involuntary Bankrupt.—It is evident that unless the debtor may be adjudged a bankrupt and his property distributed in accordance with the bankrupt statute the proceeding against him would be futile.

The statute declares that "any natural person, except a

[36] *In re* Burlington Malting Co., 109 Fed. Rep. 777, 6 Am. B. R. 369. See also Leighton v. Kennedy (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 12 Am. B. R. 229; Moulton v. Coburn (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 12 Am. B. R. 553.

[37] B. A. 1898, Sec. 56*b*.

[38] *In re* Barton's Estate, 144 Fed. Rep. 540, 16 Am. B. R. 569.

[1] B. A. 1898, Sec. 3*c*.

wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."[2]

It is essential that he owes debts to the amount of $1,000 or over to bring him within the class of debtors subject to the provisions of the act.[3]

The actual owner is subject to be adjudged a bankrupt and it is not necessary to join with him a person who has loaned him the capital with which to do business.[4] Although a corporation has been dissolved by receivership proceedings it may be adjudged a bankrupt in order that preferences made fraudulent by the bankrupt act may be set aside.[5] The insanity of a partner will not prevent an adjudication against the partnership.[6]

Acts of Bankruptcy.—A petition can not be filed against a debtor until he has done or allowed to be done something which the statute defines to be an act of bankruptcy. The act of bankruptcy must have been committed within four months prior to the filing of the petition.[7]

The statute declares that "acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, con-

[2] B. A. 1898, Sec. 4, 32 Stat. at L. 797. For a further consideration of who may be adjudged bankrupts, see Chap. VII.

[3] Taft Co. v. Century Savings Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 594; B. A. 1898, Sec. 46.

[4] *In re* Kenney, 97 Fed. Rep. 554, 2 N. B. N. 140, 3 Am. B. R. 353.

[5] Scheuer v. Smith & Montgomery, etc., Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384; *In re* White Mountain Paper Co., 127 Fed. Rep. 180, 11 Am. B. R. 491; affirmed (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 11 Am. B. R. 633.

[6] *In re* Stein & Co., 127 Fed. Rep. 547, 11 Am. B. R. 536.

[7] B. A. 1898, Sec. 3*b*.

cealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." [8]

These are the only acts committed by a debtor which are acts of bankruptcy. Unless the acts complained of by the creditor or creditors come within this enumeration it is not an act of bankruptcy, and can not be made a ground for instituting involuntary proceedings. Where, however, the act is one of those named in the statute, and the debtor subject to be adjudged a bankrupt, then one creditor, if the creditors are less than twelve in number, otherwise three or more creditors, may apply to have him declared a bankrupt, provided the application is made within four months after the commission of the act of bankruptcy, and such creditor or creditors have provable claims amounting to five hundred dollars.

Insolvency at the Time of Filing the Petition.—The statute provides that a petition may be filed against a person who is insolvent.[9] In construing this clause the supreme court has held that solvency at the time the petition was filed is a defence only when an act of bankruptcy under cl. 1. of

[8] B. A. 1898, Sec. *3a*, 32 Stat. at L. 797. For a further consideration of what constitutes acts of bankruptcy, see Chap. VIII.

[9] B. A. 1898, Sec. *3b*.

Sec. 3*a* is charged in the petition.[10] Though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy such an issue becomes superfluous where other acts of bankruptcy are charged.[10] Where the issue is material the bankrupt is entitled to have a trial by jury in respect to the question of his insolvency upon filing a written application therefor at or before the time within which an answer may be filed.[11] If such application is not filed within such time a trial by jury is deemed to be waived.[11] In such case the question is tried before the court without a jury.

Under the present statute a person is deemed insolvent whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[12]

It should be observed that the term insolvent, as used in the present act, has quite a different meaning from the same term as used in the former acts. Under the act of 1867 the term insolvency was held not to mean the absolute inability to pay one's debts at a future time upon a settlement or winding up of all the debtor's concerns; but a trader was held to be insolvent when he was not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do.[13]

[10] West v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463. See also Day v. Beck Hardware Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 8 Am. B. R. 175.

[11] B. A. 1898, Sec. 19; Bray v. Cobb, 91 Fed. Rep. 102, 1 Am. B. R. 153. See also Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

[12] B. A. 1898, Sec. 1, clause 15. See Sec. 50*a*, *ante*.

[13] Wager v. Hall, 16 Wall. 599, 21 L. Ed. 504; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723.

§ 68. In what court an involuntary petition is filed.

The court in which involuntary proceedings may be instituted depends upon where the debtor has had his domicile, resided or had his principal place of business for the greater portion of the preceding six months,[1] irrespective of the residence of the creditors. A creditors' petition must be filed in a court of bankruptcy in which the debtor could have filed a voluntary petition. The remarks that have already been made in regard to the court in which a voluntary petition may be filed apply equally to where proceedings in involuntary bankruptcy may be instituted.[2]

The domicile of a corporation is the state in which it was originally created and it can not change its domicile by filing its charter or being incorporated in another state.[3] Where there is more than one district in a state, the domicile of the corporation is that district within which the general business of the corporation is done and where it has its headquarters and general offices.[4] An involuntary proceeding in bankruptcy may be instituted against a domestic corporation in the district in which it has its principal business office.[5]

It is well settled that a petition may be filed against a corporation, incorporated in another state, in the district where it has its principal place of business, as distinct from its residence or domicile, for the greater portion of the preceding six months.[6] It is not necessary that the foreign corporation

[1] B. A. 1898, Sec. 2, clause 1; *In re* Plotke (C. C. A. 7th Cir.), 5 Am. B. R. 171, 104 Fed. Rep. 964; *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332; *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577.

[2] See Sec. 58, *ante*.

[3] St. Louis & San Francisco R. R. Co. v. James, 161 U. S. 545, 40 L. Ed. 802; Southern Railway Co. v. Allison, 190 U. S. 326; White Mountain Paper Co. v. Morse (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 11 Am. B. R. 633; *In re* United Button Co., 137 Fed. Rep. 668, 13 Am. B. R. 454.

[4] Galveston, etc., R. R. Co. v. Gonzales, 151 U. S. 496, 38 L. Ed. 248; Harvey v. Richmond, etc., R. Co. 64 Fed. Rep. 19.

[5] *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[6] Dressel v. North State Lumber Co., 107 Fed. Rep. 255, 5 Am. B. R. 744; *In re* Magid-Hope Silk Mfg. Co., 110 Fed. Rep. 352, 6 Am. B. R. 610; *In re* Marine Ma-

has complied with the state law requiring a certificate or charter to be filed before doing business in the state.[7]

The principal place of business, generally speaking, is where the plant, factory or assets of the corporation is located. If the corporation has several places of business, the principal place is usually where the general offices or headquarters of the concern is located.[8] It has been held the principal place of business of a manufacturing corporation, which had shut down its works, was where it maintained its office for the transaction of its executive and banking business.[9] Where the principal place of business is located is a question of fact to be determined by the circumstances in each particular case.

It is obvious that involuntary petitions may be filed against the same debtor in two or more districts; or that two or more petitions may be filed against the same debtor by different creditors in the same district. The order of proceedings in such cases is regulated by the general orders.[10]

§ 69. The petition.

The application to have a debtor adjudged a bankrupt and his property distributed according to the bankrupt law is made by petition. The Supreme Court of the United States has prescribed forms which should be observed and used with such alterations as may be necessary to suit the circumstances in any particular case.[11] The petition must be printed or

chine & Conveyor Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; Tiffany v. LaPlume Condensed Milk Co., 141 Fed. Rep. 444, 15 Am. B. R. 413; *In re* Duplex Radiator Co., 142 Fed. Rep. 906, 15 Am. B. R. 324; White Mountain Paper Co. v. Morse & Co. (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 11 Am. B. R. 623; *In re* Mathews Consolidated Slate Co., 144 Fed. Rep. 724, 16 Am. B. R. 407.

[7] *In re* Duplex Radiator Co., 142 Fed. Rep. 906, 15 Am. B. R. 324.

[8] See *In re* Mathews Consolidated Slate Co., 144 Fed. Rep. 724, 16 Am. B. R. 407.

[9] *In re* Marine Machine & Conveyor Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; see also Tiffany v. LaPlume Condensed Milk Co., 141 Fed. Rep. 444, 15 Am. B. R. 413.

[10] Gen. Ords. 6 and 7. See Secs. 84 and 85, *post.*

[11] Gen. Ord. 38; Official Form No. 3, Form No. 5, *post;* Gage & Co. v. Bell, 124 Fed. Rep. 371.

written out plainly, without abbreviations or interlineations, except where such abbreviations or interlineations may be for the purpose of reference.[12] It should be prepared in duplicate, one copy for the clerk and one for service upon the bankrupt.[13]

The petition should be entitled in the proper court of bankruptcy. The caption is regularly A. B., C. D. and E. F., petitioners, v. X. Y., respondent. Although the title of the court and the style of the case are not required to be stated in a caption, and in many of the earlier cases were never put in the petition, it is more convenient for reference, and is now frequently inserted by the best pleaders. The petition is addressed to the judge of the court in which it is to be filed,[14] as to the Honorable S. R., judge of the district court of the United States for the district of ——.

The petition should state the names and residences of both the petitioning creditors and the debtor. It should contain a sufficient description of the debtor to show that he is subject to be adjudged an involuntary bankrupt, and should charge his insolvency at the time of filing the petition.[15] A petition against a corporation must state that it is such a corporation as may be adjudged a bankrupt [16] and a petition against an individual that he is not a wage-earner or a person engaged chiefly in farming or the tillage of the soil.[17] If such allega-

[12] Gen. Ord. 5; Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770. See also criticism of Judge Woolson, 1 N. B. N. 239; West Co. v. Lea, 43 L. Ed. 1098, 2 Am. B. R. 463.

[13] B. A. 1898, Sec. 59*c*; *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

[14] In Anon., No. 459 Fed. Cas., s. c. 1 N. B. R. 216, leave was asked to present an involuntary petition addressed to "Hon. Nye K. Hale, District Judge." It was held that the name of the judge must be given correctly if at all; that it can not be stricken out as surplusage, and consequently permission to file was denied.

[15] B. A. 1898, Sec. 3*b*; *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929. See West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[16] *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484.

[17] *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515; *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re* Callison, 130 Fed. Rep. 987, 12 Am. B. R. 344, affirmed (C. C. A. 5th

tion is omitted and the defendant answers on the merits the defect is waived.[18] The defect may be cured by amendment.[19] It should set forth all the matters that are requisite to give jurisdiction to the court over the particular case. It should show that the debtor had had his principal place of business, resided or had his domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months.[20] If he has not had a principal place of business, resided or had a domicile within the United States, it must show that he has property within the jurisdiction of the court.[21] If one creditor only petitions, it should be averred that all the creditors of the bankrupt are less than twelve in number.[22] If, in fact, there are more than twelve creditors, the court may allow an amendment permitting other petitioning creditors to join in the petition at any time before adjudication.[23] The petition must also allege that the debtor owes debts to the amount of one thousand dollars.[24]

The petition must set forth and describe the claim or claims of the petitioning creditor or creditors sufficiently to show that they are provable claims and amount in the aggregate to five hundred dollars or over.[25] Ordinarily where the debt is

Cir.), 129 Fed. Rep. 201, 11 Am. B. R. 797; *In re* Brett, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re* White, 135 Fed. Rep. 199, 14 Am. B. R. 241; Rise v. Bordner, 140 Fed. Rep. 566, 15 Am. B. R. 297.

[18] Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[19] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762; *In re* White, 135 Fed. Rep. 199, 14 Am. B. R. 241; *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

[20] B. A. 1898, Sec. 2, clause 1.

[21] B. A. 1898, Sec. 2, clause 1.

[22] B. A. 1898, Sec. 59*d*; *In re* Miner, 104 Fed. Rep. 520, 2 N. B. N. 1073, 4 Am. B. R. 710; *In re* Novak, 101 Fed. Rep. 800, 4 Am. B. R. 311.

[23] *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665; *In re* Haff (C. C. A. 2d Cir.), 136 Fed. Rep. 78, 13 Am. B. R. 362.

[24] B. A. 1898, Sec. 4*b*; Taft Co. v. Century Sav. Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 594.

[25] B. A. 1898, Sec. 59*b*; *In re* Stein, 130 Fed. Rep. 377, 12 Am. B. R. 364; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Western Sav. & T. Co., No. 17442 Fed. Cas., s. c. 4 Saw. 490; *In re* Hadley, No. 5894 Fed. Cas., s. c. 12 N. B. R. 366.

founded upon a written instrument, as a note, bond, contract, etc., the paper is annexed to the petition as an exhibit, and proper reference to it is made in that part of the petition which is designed to describe the debt or claim. Where several claims or debts are stated in the petition each debt should be set forth in a separate paragraph, with sufficient particularity to show that it is a provable claim.

The petition should contain an allegation that the act of bankruptcy (setting forth in detail the act of the debtor which is relied upon as an act of bankruptcy) was committed within the period of four months prior to the filing of the petition. The allegation in regard to the act of bankruptcy must be positive, full and unqualified.[26] Allegations of acts of bankruptcy in the language of the act, without setting forth any other facts or circumstances, are insufficient.[27] Evidence of acts not set up in the petition will not be received or considered.[28] Where the petition is filed against a partnership the allegation should set forth an act of bankruptcy on the part of the firm. An averment of an act of bankruptcy upon the part of one of the members of the firm acting within the scope of the firm business is sufficient.[29] Several act of bankruptcy may be charged in the same petition. When this is done they should be alleged conjunctively.[30] In such case it is enough if either of them is satisfactorily proven.[30]

[26] Clark v. Henne & Meyer (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 11 Am. B. R. 583; *In re* Mero, 128 Fed. Rep. 630, 12 Am. B. R. 171; *In re* Blumberg, 133 Fed. Rep. 845, 13 Am. B. R. 343; *In re* Vetterman, 135 Fed. Rep. 443, 14 Am. B. R. 245; *In re* White, 135 Fed. Rep. 199, 14 Am. B. R. 241; *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 65; *In re* Cliffe, 2 Am. B. R. 317, 94 Fed. Rep. 354; *In re* Ewing (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 8 Am. B. R. 269; Seaboard Steel Casting Co. v. Trigg Co., 124 Fed. Rep. 75, 10 Am. B. R. 594.

[27] *In re* Hark, 135 Fed. Rep. 603, 14 Am. B. R. 400.

[28] *Ex parte* Potts, No. 11344 Fed. Cas., s. c. Crabbe 469.

[29] *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; see also Chap. XI, *post*.

[30] Bradley Timber Co. v. White (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 10 Am. B. R. 329; see also *In re* Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 8 Am. B. R. 713; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232; *In re* Drummond, No. 4093 Fed. Cas., s. c. 1 N. B. R. 231; *In re* McKibben, No. 8859

The petition should not include an application for a warrant to seize property. If it does, the petition is bad for multifariousness.[31]

The petition should conclude with a prayer that service of the petition with a subpœna may be made upon the debtor (naming him) as provided in the acts of Congress relating to bankruptcy, and that he should be adjudged by the court to be a bankrupt within the purview of said acts.[32]

The petition should be signed by the petitioning creditor or creditors, or their attorney or agent.[33] It must be verified as to matters of fact by an affidavit under oath.[34] Neither the statute nor the general orders require the petition to be signed or verified by the petitioners personally. An agent or an attorney may make the oath if it appears that he has knowledge of the facts. This, however, is not good practice where it is not inconvenient for the petitioning creditors to make it.[35] Where it does not appear that the attorney has knowledge of the facts the defect is waived if answer is made on the merits.[36] The oath or affirmation may be administered by a referee, an officer

[31] *In re* Kelly, 91 Fed. Rep. 504, Fed. Cas., s. c. 12 N. B. R. 97. 1 Am. B. R. 306; Mather v. Coe, 92 Fed. Rep. 333, 1 Am. B. R. 504; *In re* Ogles, 93 Fed. Rep. 426, 1 Am. B. R. 671.

[32] See Official Form No. 3, Form No. 5, *post*.

[33] *In re* Raynor, No. 11597 Fed. Cas., s. c. 11 Blatch. 43; Wald v. Wehl, 6 Fed. Rep. 163.

[34] B. A. 1898, Sec. 18*c*; *In re* Donnelly, 5 Fed. Rep. 783; *In re* Raynor, No. 11597 Fed. Cas., s. c. 11 Blatch. 43; Wald v. Wehl, 6 Fed. Rep. 163.

The oath attached to the creditor's petition, Form No. 54, under the act of 1867, provided for making oath on information and belief. The oath attached to the creditor's petition, Form No. 3, under the present statute, provides only for a positive statement and not for a verification upon information and belief.

[35] *In re* Herzikopf, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re* Hunt, 118 Fed. Rep. 282, 9 Am. B. R. 251; *In re* Chequasset Lumber Co., 112 Fed. Rep. 56, 7 Am. B. R. 87; but see *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

[36] *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; Leidigh Carriage Co. v. Stengel (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Simonson v. Sinsheimer (C. C. A. 6th Cir.), 95 Fed. Rep. 948.

authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country.[37]

§ 70. The time and manner of filing the petition.

The petition must be filed in the office of the clerk of a court of bankruptcy, and not with a referee. When there is a vacancy in the office of judge, the clerk should file the petition and issue subpœna.[1]

A petition in bankruptcy is deemed filed within the meaning of the statute from the time it is presented to the clerk in his office, and not from the time when it is presented to the judge for his action.[2] No notice of filing a petition is required to be given creditors.[3] No schedule is required to be filed with a petition in involuntary bankruptcy. The statute provides that the petition shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.[4] The petition is received by the clerk and filed and the case docketed as in voluntary proceedings.[5] The deposit for costs should be made by the petitioning creditors as by a voluntary debtor.[6] There is one exception, namely, the petitioning creditors are not permitted to proceed *in forma pauperis*, without making a deposit.

The petition must be filed within four months after the commission of the act of bankruptcy upon which it is

[37] B. A. 1898, Sec. 20.

[1] *In re* Urban, etc., Title Co., 132 Fed. Rep. 140, 12 Am. B. R. 687.

[2] *In re* Von Borcke, 94 Fed. Rep. 352, 2 Am. B. R. 322; *In re* Appel, 103 Fed. Rep. 931, 4 Am. B. R. 722, 2 N. B. N. 907; *In re* Bear, 5 Fed. Rep. 53; *In re* Abrahams, No. 20 Fed. Cas., s. c. 5 Law Rep. 328.

[3] *In re* Billing, 145 Fed. Rep. 395.

[4] B. A. 1898, Sec. 59*c*. If only one petition is filed it will be dismissed. *In re* Dupree, 97 Fed. Rep. 28; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R. 66.

But if the alleged bankrupt answers he waives the objection that only one copy is filed. *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

[5] Sec. 61, *ante*. Gen. Ords. 1 and 2.

[6] Consult Sec. 61, *ante*.

founded.[7] Such time does not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property, with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.[7] Where the act of bankruptcy complained of is a preference resulting from legal proceedings, the four months' period begins to run from five days before the sale, if the property is not released by that time.[8] Where the petition is filed within four months after the commission of the act of bankruptcy charged, it has been held sufficient if other creditors join in the petition before an adjudication thereon, although after the four months' period, and are reckoned in the making up of the requisite number of creditors and amount of claims.[9] Where the debtor suffers a preference to be gained by legal proceedings the creditor need not wait for sale, but may file his petition within the five days before the advertised date of the sale.[10]

In computing the four months within which the petition is to be filed the first day is excluded and the last day included, unless the last day falls upon a Sunday or a legal holiday, in which event the last day included shall be the next day there-

[7] B. A. 1898, Sec. 3*b*; *In re* Mingo Valley Creamery Association, 100 Fed. Rep. 282, 4 Am. B. R. 67; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Edelman (C. C. A. 2d Cir.), 130 Fed. Rep. 700, 12 Am. B. R. 238.

[8] Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; 2 N. B. N. 174; *In re* National Hotel & Cafe Co., 138 Fed. Rep. 947, 15 Am. B. R. 69; *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123.

[9] *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288, 3 N. B. N. 428; *In re* Ryan, 7 Am. B. R. 562, 114 Fed. Rep. 373.

[10] *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123.

after which is not a Sunday or a legal holiday.[11] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving.[12]

The authority of an attorney to file a petition should be challenged by rule to show his authority supported by affidavits and not by answer.[13]

§ 71. The writ of subpœna.

The eighteenth section of the bankruptcy act provides that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time."

The first step, therefore, after filing a petition in involuntary bankruptcy in the clerk's office, is to have issued and served a writ of subpœna.[1] This is a writ issuing out of the court of bankruptcy directed to the marshal, commanding him to summon the defendant or defendants, naming them, to appear before a day certain and answer the matters alleged against them.[2]

[11] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480.

[12] B. A. 1898, Sec. 1, clause 14; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R. 66; *In re* Dupree, 97 Fed. Rep. 28.

[13] Gage & Co. v. Bell, 124 Fed. Rep. 371, 10 Am. B. R. 696.

[1] For form of subpœna, see Official Form No. 5, Form No. 8, *post*.

The clerk may issue a subpœna when there is a vacancy in the office of judge, *In re* Urban, etc., Title Co., 132 Fed. Rep. 140, 12 Am. B. R. 687.

[2] Gen. Ord. 3.

In the United States courts a subpœna is directed to the marshal, although it may be observed that formerly the writ of subpœna differed from other writs of process in equity in being directed to the party himself, whereas the subsequent writs are directed to certain ministerial officers commanding them to take proceedings

This writ is issued as of course upon application of the plaintiff.[3] The subpœna is issued under the seal of the court of bankruptcy, and is signed by the clerk of that court.[4] The writ bears teste of the judge or, when that office is vacant, of the clerk of that court[5] as of the date of issuing the writ.[6]

The subpœna is returnable within fifteen days unless the judge for cause fixes a longer time.[7] Formerly a writ of subpœna named a money penalty in case of disobedience, but this has fallen into disuse in equity, and is unnecessary in bankruptcy for the reason that the plaintiff has a remedy in procuring an adjudication of bankruptcy, provided neither the bankrupt nor a creditor appears to controvert the facts alleged in the petition.[8]

At the bottom of the subpœna in equity is placed a memorandum that the defendant is to enter his appearance in the suit and plead in the clerk's office on or before the day on which the writ is returnable, otherwise the bill may be taken *pro confesso*,[9] but form No. 5 in bankruptcy contains no such memorandum. If no service is made before the return day, other subpœnas *totics quotics* may be issued until the defendants are all served.[10]

§ 72. In what cases a subpœna is necessary.

A subpœna is necessary in case of a petition for involuntary bankruptcy,[1] but not when the petition is filed by the bankrupt himself. No subpœna or service is required to be served on the creditors.[2] To bring a defendant whos is charged with being a bankrupt before the court in the first instance the personal service of a subpœna is proper and necessary. He can

against the defendant calculated to enforce obedience. See Daniels Chan. Prac. (1 ed.) 554.

[3] Equity Rule 12.

Form 4 provides for an order to show cause, etc., directing a subpœna.

[4] R. S. Sec. 911; Gen. Ord. 3.

[5] R. S. Sec. 911.

[6] R. S. Sec. 912.

[7] B. A. 1898, Sec. 18.

[8] B. A. 1898, Sec. 18*d*.

[9] Equity Rule 12; B. A. 1898, Sec. 18*d*; Official Form No. 5. Form No. 8, *post*.

[10] Equity Rule 14.

[1] B. A. 1898, Sec. 18.

[2] *In re* Billings, 145 Fed. Rep. 395.

not be brought in any other way. But he may voluntarily enter his appearance and thereby he waives any want of or defect in the service of a subpœna.[3] A subpœna should be issued and served on all the defendants named in the petition.

If the debtor die after the proceeding are begun and before the adjudication, his legal representatives must be brought in by subpœna.[4]

§ 73. The service of a subpœna.

A subpœna and copy of the petition are served by the marshal or his deputy, or some other person specially appointed by the court for that purpose.[1] The service can be made only within the territorial jurisdiction of the bankruptcy court issuing the writ.[2] The writ can not be served by the marshal of another district within his jurisdiction.

The manner of serving the subpœna and petition is prescribed by Equity Rule 13, which is as follows: "The service of all subpœnas shall be by delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family." This must be strictly followed or the service will be defective and may be set aside.[3]

[3] *In re* Ulrick, No. 14327 Fed. Cas., s. c. 3 Ben. 355; Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Henderson v. Carbondale Co., 140 U. S. 25, 35 L. Ed. 332; Buerk v. Imhaeuser, 8 Fed. Rep. 457.

[4] Shute v. Patterson (C. C. A. 8th Cir.), 147 Fed. Rep. 509.

[1] Equity Rule 15, R. S. Secs. 788-790; Bray v. Cobb, 91 Fed. Rep. 102, 1 Am. B. R. 153; United States v. Montgomery, 2 Dall. 335; Hyman v. Chales, 12 Fed. Rep. 855; Deacon v. Sewing Machine Co., No. 3694*a* Fed. Cas., s. c. 14 Reporter 43.

[2] Jobbins v. Montague, No. 7329 Fed. Cas., s. c. 5 Ben. 422; Paine v. Caldwell, No. 10674 Fed. Cas., s. c. 1 Hask. 452; *In re* Hirsch, No. 6529, Fed. Cas., s. c. 2 Ben. 493; *In re* Litchfield, 13 Fed. Rep. 868; Herndon v. Ridgway et al., 17 How. 424, 15 L. Ed. 100. But see Babbitt v. Burgess, No. 693, Fed. Cas., s. c. 2 Dill. 169; Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093; Butterworth v. Hill, 114 U. S. 128, 29 L. Ed. 119; Pacific Railroad v. Missouri Pacific Railway Co., 3 Fed. Rep. 772.

[3] Romaine v. Union Insurance Co., 28 Fed. Rep. 635-6, and cases there collated; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98.

The objection that service was not properly made may be raised by motion, but not by demurrer.[4]

The subpœna is regularly returnable within fifteen days, unless the judge shall for cause fix a longer time.[5] But the failure to serve the subpœna within fifteen days after its issue does not put an end to the bankruptcy proceedings.[6] Alias subpœnas may be issued when for any reason it has been impossible to serve the original subpœna.[7]

Service is required to be made on each defendant at least five days before the return day.[8] Hence in a suit against a husband and wife each must be personally served.[9] In a suit against an infant service should be made upon him personally, and not only upon his guardian or parent.[10]

Service is regularly made upon a corporation by serving the subpœna upon one or more of its officers within the district within which it is domiciled.[11] It can not be made on an officer of a non-resident corporation temporarily within the

[4] *In re* Seaboard Fire Underwriters, 137 Fed. Rep. 987, 13 Am. B. R. 722.

[5] B. A. 1898, Sec. 18*a*.

[6] Gleason v. Smith, Perkins & Co., 145 Fed. Rep. 895, 16 Am. B. R. 602; *In re* Stein (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288.

[7] Gleason v. Smith, Perkins & Co., 145 Fed. Rep. 895, 16 Am. B. R. 602.

[8] See Official Form 4, Form No. 7, *post*.

[9] O'Hara v. O'Connell, 93 U. S. 151, 23 L. Ed. 840.

[10] In Woolridge v. McKenna, 8 Fed. Rep. 670, Judge Hammond said: "But never is service of process upon the guardian or parent or other substituted process of that character sufficient to bind the infant where he is personally an essential party defendant." See also O'Hara v. McConnell, 93 U. S. 150, where service was made on the husband of an infant. In Smith v. Marshal, 2 Atk. 70, a service on the mother of infants was held good, it appearing that the infants were secreted.

[11] Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. Ed. 768; Galveston Ry. v. Gonzales, 151 U. S. 496, 38 L. Ed. 248; Southern Pacific Co. v. Denton, 146 U. S. 202, 36 L. Ed. 377.

As to where the domicile of a corporation is located, see Sec. 68, *ante*. Interstate Com. Com. v. Ry. Co., 57 Fed. Rep. 948, s. c. 6 C. C. A. 653; Harvey v. Richmond, etc., R. Co., 64 Fed. Rep. 19. As to corporations created by two states, see St. Louis & San Francisco R. Co. v. James, 161 U. S. 545, 40 L. Ed. 802; Southern Ry. Co. v. Allison, 190 U. S. 326.

district.[12] It will be observed that the cases cited arose under the act of August 13, 1888,[13] where it is provided that a person shall be sued only in the district of his residence. The bankrupt act provides that a person may be adjudged a bankrupt who has his principal place of business, resides or had his domicile within the jurisdiction of the court for the preceding six months, or the greater portion thereof, or aliens who have property within the jurisdiction of the court.[14] But the general rule is probably applicable to bankruptcy suits that service can not be made upon a non-resident defendant temporarily within the district for the purpose of attending court, either state or federal,[15] nor upon a public officer in the discharge of his duty within the district[16] nor upon a person fraudulently enticed into the district for the purpose of getting service on him.[17] So also a person is free to attend upon bankruptcy proceedings as a witness or to prove a debt, etc., without interference by service of process of any kind.[18]

Where personal service on a resident defendant by delivery of a copy of the subpœna to him is impracticable or inconvenient, the rule provides that the copy shall be left at his house or usual place of abode.[19] Leaving a copy with the

[12] Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517; Fidelity Trust and Safety Vault Co. v. Mobile St. R. R. Co., 53 Fed. Rep. 850.

[13] 25 Stat. at L. 434.

[14] B. A. 1898, Sec. 2, clause 1.

[15] Kauffman v. Kennedy, 25 Fed. Rep. 785; Parker v. Hotchkiss, No. 10739, Fed. Cas., s. c. 1 Wall. Jr. 269; Matthews v. Puffer, 10 Fed. Rep. 606; Brooks v. Farwell, 4 Fed. Rep. 167; Kinne v. Lant, 68 Fed. Rep. 436.

[16] Lyell v. Goodwin, No. 8016, Fed. Cas., s. c. 4 McLean, 29; see also U. S. Const., Art. 1, Sec. 6, with reference to senators and congressmen; Miner v. Markham, 28 Fed. Rep. 387.

[17] Union Sugar Refinery v. Mathieson, No. 14397, Fed. Cas., s. c. 2 Cliff. 304; Steiger v. Bonn, 4 Fed. Rep. 17; Plimpton v. Winslow, 9 Fed. Rep. 365; Blair v. Turtle, 5 Fed. Rep. 394.

[18] Matthews v. Tuffts, 87 N. Y. 568, and cases cited in appellant's brief; cases cited in note to *ex parte* Hawkins, 4 Ves. Jr. 691.

Brett v. Brown, 13 Abb. Pr., N. S. (N. Y.) 295; Sanford v. Chase, 3 Cowen (N. Y.) 381; Norris v. Beach, 2 Johns. (N. Y.) 294; Lampkin v. Starkey, 7 Hun (N. Y.) 479.

[19] Equity Rule 13. See also Form No. 4.

clerk of a hotel at which the defendant resided and of which he was proprietor was held sufficient.[20] It is sufficient under this provision if a copy of the subpœna is left "with some adult person who is a member or resident in the family" on the steps or on a portico, or in some outhouse or barn adjoining to or immediately connected with the family mansion.[21] But it seems that such service in the corner of the yard, one hundred and twenty-five feet away from the house, is not sufficient.[22] The copy must be left at the present and not at some former residence of the defendant.[23]

Voluntary Appearance Waives Service.—A person may voluntarily appear and plead without being served with subpœna. In such case the court has complete jurisdiction over him as though he had been legally served with process.[24] So also if a non-resident of the district comes into the case for the purpose of proving a claim he is subject to the jurisdiction of the court, irrespective of his place of residence,[25] and is bound to take notice of and obey the orders of the court to the same extent as a party to the suit.

§ 74. The return of the subpœna.

On or before the day named in the writ on which it is returnable the officer returns it to the clerk's office, with his action therewith endorsed on the back of it. This is called the marshal's return to the writ,[1] which should state the day on which the writ was received, and when, where and how

[20] *In re* Risteen, 122 Fed. Rep. 732, 10 Am. B. R. 494.

[21] Phœnix Ins. Co. v. Wulf, 1 Fed. Rep. 775; Kibbe v. Benson, 17 Wall. 624, 21 L. Ed. 741.

[22] Kibbe v. Benson, 17 Wall. 624, 21 L. Ed. 741, where the service considered was made under a state statute very similar to Rule 13.

[23] Hyslop v. Hoppock, No. 6988, Fed. Cas., s. c. 5 Ben. 447.

[24] *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Ullrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[25] Clay v. Smith, 3 Pet. 411, 7 L. Ed. 723; *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 482.

[1] See Loveland's Forms of Federal Prac. No. 333.

service was made. It is then signed by the marshal, or in the name of the marshal by his deputy.[2] The truth of an unverified return of a marshal or his deputy is not to be questioned in the cause.[3] If he makes a false return he is liable for any damage that may be sustained in consequence of it.[4]

When a writ is served by one specially appointed for that purpose, proof of the service is made by an affidavit of the one who served it.[5] The return of the marshal may be amended to comply with the facts,[6] but not to supply a fatal omission,[7] as the absence of the clerk's signature, or the authority in whose name it is issued, or the like.

If the officer has failed to make service of it on the defendants, or any of them, he should return the writ and state in his return the reason why no service has been made, as that the defendant named has not been found within the district. An alias subpœna may then be issued.[8]

The endorsement on the writ that service is accepted and signed by the defendant, dated at a place within the district, is sufficient.[9] But accepting service without the district "to have the same effect as if duly served on me by a proper officer" is not a sufficient service.[10]

§ 75. Service by publication.

Section 18 of the act also provides that "in case personal service can not be made, then notice shall be given by pub-

[2] See Hill v. Gordon, 45 Fed. Rep. 278.

[3] Phœnix Ins. Co. v. Wulf, 1 Fed. Rep. 775; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98; McClaskey v. Barr, 45 Fed. Rep. 151.

[4] See Walker v. Robbins, 14 How. 584, 14 L. Ed. 552; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98.

[5] Equity Rule 15.

[6] R. S. Sec. 954; Phœnix Ins. Co. v. Wulf, 1 Fed. Rep. 775.

[7] Dwight v. Merritt, 4 Fed. Rep. 614; Peaslee v. Haberstro, No. 10884, Fed. Cas. ,s .c. 15 Blatch. 472; United States v. Rose, 14 Fed. Rep. 681.

[8] Equity Rule 14.

[9] The proper endorsement in such a case is "I promise to appear at the return of the within writ and pray the court to enter my appearance accordingly," and signed by the defendant. This form is sufficient if made by a non-resident defendant without the district

[10] Butterworth v. Hill, 114 U. S. 132-3.

lication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

The reference here is to the method prescribed by Section 8 of the Act of March 3, 1875.[1] The bankrupt act changes the time for publication and specifies the return day thereafter. In other respects substituted service is made in bankruptcy as under the Act of 1875.

The court should make an order directing the absent defendant or defendants to appear and plead, answer or demur by a day certain to be designated, which order is served on the absent defendant or defendants, if practicable, wherever found. Where personal service is not practicable the order may be published in such manner as the court may direct, and "the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer period."[2] Upon proof of service or publication of such order and the performance of the directions contained in the same the court may entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the district. Any adjudication affecting absent defendants without appearance should affect only property within the district which can come into the possession of the trustee.[3] Substituted service under this act does not vest the court with jurisdiction of the person generally.

[1] 18 Stat. at L. 470, 1 Supp 84. See also Bracken v. Union Pac. Ry. Co., 56 Fed. Rep. 447, 5 C. C. A. 548; Batt v Proctor, 45 Fed. Rep. 515; Beach v. Mosgrove, 16 Fed. Rep. 305; Loveland's Forms of Fed. Prac., Nos. 63 to 69.

For practice in bankruptcy and form of order, see *In re* Murray, 3 Am. B. R. 601, 96 Fed. Rep. 600.

[2] B. A. 1898, Sec. 18, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[3] *In re* Appel, 103 Fed. Rep. 931, 4 Am. B. R. 722; Citizens Sav. & T. Co. v. I. C. R. R. Co., 205 U. S. 46, 51, — L. Ed. ——.

§ 76. How to object to an irregularity of service of subpœna.

Objections are properly raised to the sufficiency of the service by a motion to set aside the return of the marshal;[1] to an irregularity in issuing the subpœna by a motion to quash the writ;[1] to an order for substituted service improperly granted by a motion to set aside the order or service or both.[2] In these cases the motion should be accompanied with a special appearance for the purpose of the motion only, for by a general appearance the defendant submits himself to the jurisdiction of the court.[3]

§ 77. Interlocutory orders to protect the estate.

Upon filing the petition in bankruptcy it may be desirable and necessary to apply to the court for a temporary order to protect and preserve the estate of the bankrupt until the appointment of a trustee competent to take and administer the estate. Such application may be made in voluntary or involuntary proceedings. An application of this nature, however, is very rarely made in a case of voluntary bankruptcy.[1]

It is obvious that in every case of involuntary proceedings in bankruptcy a considerable interval of time is bound to elapse between the filing of the petition and the appointment and qualification of a trustee. Thus, after the petition is filed a subpœna must issue, be served and returned.[2] The bankrupt is entitled to ten days thereafter within which to

[1] *In re* Seaboard Fire Underwriters, 137 Fed. Rep. 987, 13 Am. B. R. 722; Romaine v. Union Ins. Co., 28 Fed. Rep. 634-5, where the authorities are examined and the practice is explained. See also Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 850; Von Roy v. Blackman, No. 16997, Fed. Cas., s. c. 3 Woods, 98; Am. Bell Tel. Co. v. Pan Electric Tel. Co., 28 Fed. Rep. 625; Pacific R. Co. v. Missouri R. R. Co., 3 Fed. Rep. 772; Gregory v. Pike, 79 Fed. Rep. 520.

[2] Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. Rep. 850; Bowen v. Christian, 16 Fed. Rep. 730; Rogers v. Riessner, 31 Fed. Rep. 591.

[3] *In re* Smith, 117 Fed. Rep. 961, 9 Am. B. R. 98.

[1] *In re* Rosenthal, 144 Fed. Rep. 548, 16 Am. B. R. 448.

[2] B. A. 1898, Sec. 18*a*.

plead.[3] He may demand and have a jury trial.[4] All this takes place prior to the adjudication. Not less than ten nor more than thirty days after the adjudication a meeting of creditors is required to be held, at which a trustee of the bankrupt's estate is chosen by the creditors.[5] Upon their failure to agree the trustee is appointed by the court.[6] If there is danger during this interval of the bankrupt or any other person wasting or disposing of the property, or of a creditor obtaining an undue advantage over the other creditors either by judicial process or otherwise, it is the duty of the court, upon proper application, to prevent such injury by making such orders as may be most beneficial to the estate and the creditors generally.

There are four ordinary modes of proceeding for this purpose:

First. The court is expressly authorized to appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.[7]

The court will not appoint a receiver except upon application of a party in interest for cause shown. The application may be by motion or petition supported by affidavits.

The court may authorize the business of a bankrupt to be conducted for limited periods by receivers, the marshals or trustees, if necessary in the best interests of the estates.[8]

Second. The court may order a suit, which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, to be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, such action may be further stayed until

[3] B. A. 1898, Sec. 18*b*.
[4] B. A. 1898, Sec. 19*a*.
[5] B. A. 1898, Secs. 44 and 55; Gen. Ord. 13.
[6] B. A. 1898, Sec. 44.
[7] B. A. 1898, Sec. 2, clause 3. See Sec. 77*a*, *post*.
[8] B. A. 1898, Sec. 2, clause 5.

twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.[9]

Third. The court may restrain the debtor or any other person or persons from making any transfer or disposition of any part of the debtor's property, not excepted by the statute from the operation thereof, and from any interference therewith.[10] This proceeding is further considered in section 78.

Fourth. The court may in a proper case issue a warrant to a marshal to seize and hold the property of a debtor subject to further orders. Proceedings of this nature are further considered in section 79.

Applications for orders of this nature may be made by petition or motion supported by affidavits. The application should be made to the judge and not to a referee. But the judge may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts.[11] In case the judge is absent from the judicial district, sick or unable to act, the clerk may certify this fact to a referee who may exercise the powers of the judge for taking possession and releasing the property of the bankrupt.[12]

§ 77a. Receivers in bankruptcy.

The court is expressly authorized to appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified.[1] The courts have frequently exercised this power under the present act.[2]

[9] B. A. 1898, Sec. 11*a*. As to staying suits see also Sec. 22, *ante*.

[10] B. A. 1898, Sec. 2, clause 15.

[11] Gen. Ord. 12.

[12] B. A. 1898, Sec. 38, clause 3.

[1] B. A. 1898, Sec. 2, cl. 3.

[2] *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822; Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re* Sievers, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49; *In re* Florcken, 107

The application for a receiver should be made by a party in interest. The application may be made by petition or motion supported by affidavits.[3] The petition should show that it is necessary for the preservation of the estate that a receiver be appointed. A receiver is regularly appointed by the judge, but a referee has power to make the appointment.[4] The appointment will rarely be made until the adverse interests have notice and an opportunity to be heard.[5] The receiver must qualify and give bond before he takes possession of the property.[6] An ancillary receiver has been appointed in aid of another court which is administering the estate of a debtor.[7]

A receiver in bankruptcy derives his power from the statute and possesses such power only as the statutes confer or such as may be fairly inferred from the general scope of the law of his appointment.[8] He is not a general receiver in the sense that receivers are appointed by courts of equity. A receiver in bankruptcy is a temporary custodian until a trusteee is appointed. He does not exercise the powers of a trustee.[8] The court may order him to sell property of the bankrupt and

Fed. Rep. 241; 5 Am. B. R. 802; Booneville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; *In re* Rogers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79.

In Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 295, the court appointed a receiver to take charge of the property of the bankrupt before an adjudication on bill filed by creditors.

[3] For form of petition, see Form No. 23.

[4] *In re* Florcken, 107 Fed. Rep. 241, 5 Am. B. R. 802; *In re* Maher, reported Sec. 32 note, *ante*; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

[5] Latimer v. McNeal (C. C. A. 3d Cir.), 142 Fed. Rep. 451, 16 Am. B. R. 43; Ross-Meehan Foundry Co. v. Southern Car & Foundry Co., 124 Fed. Rep. 403, 10 Am. B. R. 624.

[6] Beach v. Macon Grocery Co., 116 Fed. Rep. 143; 8 Am. B. R. 751; *In re* Haff (C. C. A. 2d Cir.), 135 Fed. Rep. 742, 13 Am. B. R. 354.

[7] *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232.

But see Ross-Meehan Foundry Co. v. Southern Car & Foundry Co., 124 Fed. Rep. 403, 10 Am. B. R. 624.

[8] Booneville Nat. Bank v. Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13; Whitney v. Wenman, 198 U. S. 539, 553; 47 L. Ed. 1157, 14 Am. B. R. 45; Guaranty Title & Trust Co. v. Pearlman, 144 Fed. Rep. 550, 16 Am. B. R. 461.

may appoint appraisers when such a course is necessary for the preservation of the value of the estate,[9] or to take any other steps incident to the protection of the property in his custody.[10] A receiver may insure property in his possession. The court may authorize a receiver to take possession of property held and claimed adversely by third parties.[11] A receiver can not sue for the recovery of property claimed to belong to the bankrupt's estate.[12] A receiver may apply for an injunction to stay suit for removal of goods of bankrupt from leased premises for non-payment of rent, when the receiver is in possession of such goods.[13]

The statute provides that the court may authorize the business of the bankrupt to be conducted for limited periods by receivers if necessary in the best interests of the estates.[14]

Where there is a delay in the appointment of the trustee and it is for the best interests of the estate that the business be conducted by the receiver, the court may authorize such receiver to borrow money and issue receivers' certificates. This should only be done when it is made to appear that it is for the best interests of the estate to continue the business and that it

[9] *In re* Rogers (C. C. A., 7th Cir.), 125 Fed. Rep. 160, 11 Am. B. R. 79; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

[10] *In re* Hamilton (Ref.), 4 Am. B. R. 543, 2 N. B. N. 959.

He may make proof of loss under a fire insurance policy, where bankrupt has absconded, Sims v. Union Ass. Soc. 129 Fed. Rep. 804.

[11] *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Moody, 131 Fed. Rep. 525, 12 Am. B. R. 718, s. c. 134 Fed. Rep. 628, 14 Am. B R. 272; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 14 Am. B. R. 70.

But see Beach v. Macon Grocery Co., 116 Fed. Rep. 143, 8 Am. B. R. 751.

[12] Booneville Nat. Bank v. Blakey (C. C. A., 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; Guaranty Title & Trust Co. v. Pearlman, 144 Fed. Rep. 550, 16 Am. B. R. 461; *In re* Nat. Mercantile Agency, 128 Fed. Rep. 639, 12 Am. B. R. 189.

But see *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822; *In re* Barrett, 132 Fed. Rep. 362, 12 Am. B. R. 626.

[13] *In re* Kleinhans, 113 Fed. Rep. 107, 7 Am. B. R. 604.

[14] B. A. 1898, Sec. 2, cl. 5.

can not be continued without borrowing money for that purpose.

The compensation of receivers is an expense of the administration of the estate and is entitled to priority under Sec. 64*b* of the bankrupt act. The amount of the compensation of a receiver appointed under Section 2, Clause 3, to take charge of the estate, rests in the discretion of the court and is not limited by the provisions of the bankrupt act.[15] But where the compensation is for carrying on the business of the bankrupt pursuant to Section 2, Clause 5, as amended by the act of February 5, 1903, it is limited in amount to that which a trustee might receive under the act for the same services.[16] The court having jurisdiction of the proceedings has power to allow compensation to receivers appointed by other courts.[17] Expenses of a receivership will not be allowed out of proceeds of a sale of perishable property when it will diminish bankrupt's exemption.[18]

Where a petition is dismissed the court may require the petitioning creditors to pay the expenses of a receivership, when the receiver was appointed on their application upon filing the petition.[19]

Objections to receivers' reports should be made promptly. The court will not allow a re-examination after a report has been approved by the creditors and a period of acquiescence has elapsed thereafter.[20]

[15] *In re* Kirkpatrick (C. C. A. 6th Cir.), 148 Fed. Rep. ——, 17 Am. B. R. ——; *In re* Sully, 133 Fed. Rep. 997, 13 Am. B. R. 22; *In re* Adams Sartorial Co., 101 Fed. Rep. 215, 4 Am. B. R. 107; *In re* Scott 99 Fed. Rep. 404, 3 Am. B. R. 625.

[16] B. A. 1898, Sec. 2, cl. 5, as amended by the Act of Feb. 5, 1903, 32 Stat. at L. 797; *In re* Richards, 127 Fed. Rep. 772, 11 Am. B. R. 581; *In re* Cambridge Lumber Co., 136 Fed. Rep. 983, 14 Am. B. R. 168; *In re* Kirkpatrick (C. C. A. 6th Cir.), 148 Fed. Rep. ——, 17 Am. B. R. ——.

[17] *In re* Sears, Humbert & Co., 128 Fed. Rep. 275, 10 Am. B. R. 389.

[18] *In re* Le Vay, 125 Fed. Rep. 990, 11 Am. B. R. 114.

[19] *In re* Lacov (C. C. A. 2d Cir.), 142 Fed. Rep. 960, 15 Am. B. R. 290.

[20] *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

§ 78. Temporary injunction or restraining order.

One means of protecting the estate of the bankrupt is by a temporary injunction or restraining order. The court of bankruptcy is expressly authorized to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the bankrupt statute.[1] Under this provision the court may, upon proper application and cause shown, restrain the debtor or any other party to the bankruptcy proceedings from making any transfer or disposition of any part of the debtor's property not excepted by the statute from the operation thereof, or from any interference therewith.[2] It has been held that a court of bankruptcy can not restrain a stranger from dealing with property in his possession which he claims to own.[3]

The mode of applying for a temporary restraining order is regularly by a separate petition or motion supported by affidavits.[4] The petition is entitled and filed in the bankruptcy

[1] B. A. 1898, Sec. 2, clause 15.

[2] *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689; Beach v. Macon Grocery Co. (C. C. A., 5th Cir.), 116 Fed. Rep. 143, 8 Am. B. R. 751; *In re* Gutwillig, 90 Fed. Rep. 475, 1 Am. B. R. 78; Blake, Moffitt & Towne v. Francis-Valentine Co., 89 Fed. Rep. 691, 1 Am. B. R. 372; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 293.

Stengel-Rothschild v. Leidigh Carriage Co., Southern District of Ohio (not reported). The Leidigh Carriage Co., of Dayton, O., on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount of something like fifty thousand dollars. Attachments were issued and levies made under these judgments prior to the assignment, and some of the property had been sold, but funds arising therefrom had not been distributed. Upon an application for a temporary injunction filed with the petition of the creditors, Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from disposing of or interfering with the property of the debtor.

[3] *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215, 3 N. B. N. 216.

[4] Irving v. Hughes, No. 7076, Fed. Cas., s. c. 2 N. B. R. 61; Creditors v. Cozens, No. 3378, Fed. Cas., s. c. 3 N. B. R. 281.

proceedings. It should be positive in its averments, and not on information and belief,[5] and should contain a description of the property. It must be verified by the oath of the petitioner or his agent or attorney.[6] A bill in equity has also been used.[7] The hearing may be had *ex parte*. An order may be passed and an injunction issued without notice to the adverse party.[8] The injunction or restraining order is merely temporary, but continues until vacated by order of the court. The present statute does not limit the duration of such injunction. The writ of injunction issues out of the court under the seal thereof, and is tested by the clerk.[9] The writ is then served upon the parties by the marshal and a return made as upon other process.

Any party having an interest in the property covered by the injunction may appear and move for a dissolution thereof. At the hearing affidavits and counter affidavits may be read by either party.[10] When the affidavits filed upon a motion to dissolve an injunction do not sustain the allegation of the petition, but disclose the existence of another ground for an injunction, the petition may be amended so as to cover that ground.[11] It can not be urged as a ground for dissolving an injunction that the petition does not allege at what time the act of bankruptcy was committed or contain any positive charge of the act of bankruptcy, or because there is an irregularity in the proceedings. These are also matters that may be corrected by amendment. Nothing would be gained by dissolving the injunction and then reissuing upon the same state of facts. In order to obtain the dissolution of an injunc-

[5] *In re* Bloss, No. 1569, Fed. Cas., s. c. 4 N. B. R. 427.

[6] *In re* Fendley, No. 4728, Fed. Cas., s. c. 10 N. B. R. 250.

[7] Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 295; Blake, Moffitt & Towne, v. Francis Valentine Co., 89 Fed. Rep. 691, 1 Am. B. R. 372; *In re* Fendley, No. 4728, Fed. Cas., s. c. 10 N. B. R. 250; Blackburn v. Stannard, No. 1468, Fed. Cas., s. c. 5 Law Rep. 250.

[8] *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513, and cases cited in the opinion.

[9] Rev. Stat., Sec. 911; Gen. Ord. 3.

[10] *In re* Bloss, No. 1562, Fed. Cas., s. c. 4 N. B. R. 147.

[11] *In re* Bloss, No. 1562, Fed. Cas., s. c. 4 N. B. R. 147.

tion the *prima facie* case made out by the petition and affidavits in support thereof must be rebutted.[12]

§ 79. The seizure of the debtor's property.

Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt an application may be made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending the hearing of the petition.[1] There was no provision corresponding to this one in the former bankrupt acts. The application may be by petition or motion supported by an affidavit that the bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value.[2] If satisfactory proof is made by the applicant the judge may issue a warrant to the marshal to seize and hold the property of the bankrupt, or any part of it, subject to further orders.[3]

The application must regularly be made to the judge. A referee is authorized to exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act.[4]

Before a warrant can be issued the petitioner applying therefor must enter into a bond,[5] with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in

[12] *In re* Binns, No. 1422, Fed. Cas., s. c. 4 Ben. 152; *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513.

[1] B. A. 1898, Sec. 3*c* and Sec. 69.

[2] B. A. 1898, Sec. 69; *In re* Kelly, 91 Fed. Rep. 504, 1 Am. B. R. 306.

[3] B. A. 1898, Sec. 69.

[4] B. A. 1898, Sec. 38, clause 3.

[5] B. A. 1898, Sec. 3*c* and Sec. 69.

such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.[6] If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property.[6] Counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond.[6]

When the marshal receives a warrant general in its nature it is his duty to take possession of the bankrupt's property. If the warrant commands him to seize certain specified property it is his duty to take possession only of the property specified. He is not entitled to seize property which has been transferred by a bankrupt to another person. Such transfers are voidable, but the title is in the transferee and will not ordinarily be questioned until after the adjudication.[7]

[6] B. A. 1898, Sec. 3*e*.

[7] *In re* Harthill, No. 6161, Fed. Cas., s. c. 4 Ben. 448; Doyle v. Sharpe, 74 N. Y. 154, affirming 41 N. Y. Super. 312; 43 *id.* 545.

But see Stevenson v. McLaren, 14 N. B. R. 403, s. c. 3 Cent. Law Jour. 478.

In re Rockwood, 91 Fed. Rep. 363, 1 Am. B. R. 272, Judge Shiras, construing this section, says: "It does not authorize the court to issue a warrant to the marshal to take the property away from the possession of a third party who holds it under a claim of right to title. According to the showing made in the application the mortgagee has a good title to and the right to possession of the property in question unless such title and right are defeated under the provisions of the bankrupt law. Whether these provisions will become operative against the title and right of the mortgagee depends primarily upon the question whether Rockwood will be adjudicated to be a bankrupt on the petition of the creditors, which is set down for a hearing at a future day. The mortgagee, Mary Boehlen, is not a party to these proceedings, and in by judgment Sec. 69 does not confer any authority on the court to arbitrarily deprive her of the possession of property held by her under claim of title. It can not be judicially known at the present time whether Rockwood will or will not be adjudged a bankrupt, and until he is so adjudged there is no ground shown for attacking the possession of the property now held by the

In such cases the transferee may obtain an order, upon a petition filed in the court of bankruptcy for that purpose, to have such property released from the marshal's possession.[8] The

mortgagee. Sec. 69 is intended to authorize the court to prevent the wasting, deterioration, or loss of the bankrupt's property in his possession, pending the hearing on the petition for adjudication, but it is not intended to authorize the taking away from third parties of property to which they assert title. The section provides that before the issuance of a warrant of seizure a bond must be executed conditioned to indemnify the bankrupt for such damages as he may sustain if the seizure be wrongfully obtained, it being further provided that the property seized shall be released if the bankrupt give bond conditioned to turn over the property or its value to the trustee in case he is adjudged a bankrupt.

"These provisions clearly show that the section is intended to apply only to seizure of property in possession of the bankrupt, and it does not authorize the seizure of property which has passed from the possession of the bankrupt before the institution of proceedings under the act. In a proper case and upon a proper showing an injunction or restraining order may be obtained upon application to which the third person is made a party, restraining the sale or other disposition of the property until the hearing upon the petition for adjudication and the appointment of the trustee, but the proper showing therefor must be made.

"The present application for a warrant directing the marshal to seize property in the possession of the mortgagee must be refused for the reasons stated." See also *In re* Kelly, 91 Fed. Rep. 504, 1 Am. B. R. 306.

In Goldman, Bettman & Co. v. Smith, District Court for, etc., 7 Cin. Court Index, No. 70, Dec. 24, 1898, s. c. Vol. 41 W. L. Bul. 4, a petition for involuntary bankruptcy was filed by four Cincinnati creditors against one Newton M. Smith. It was alleged that some four weeks before the filing of the petition Smith came to Cincinnati, in pursuance of a scheme to defraud his creditors, and with money that was advanced him by his brother-in-law, paid his creditors such amounts as he was then owing them on account. He immediately purchased large amounts of merchandise, and two weeks thereafter transferred to his brother-in-law his entire stock including the merchandise last purchased. The conveyance was founded upon a pretended consideration of a pre-existing debt, consisting largely of the money advanced as above. Upon application of the petitioning creditors and proof of the facts by affidavit, Judge Barr issued an order directing the marshal to forthwith seize the property and hold it, subject to the further order of the court, the creditors being required to give bond for the value of the property. See also cases cited page 254, note 11.

[8] *In re* Harthill, No. 6161, Fed. Cas., s. c. 4 Ben. 448. See Sec. 152 *post*.

marshal is not justified in taking any property which belongs to a third person. If he does so it has been held that his warrant will protect him only so far as the goods belong to the bankrupt.[9]

In case the bankrupt desires to have possession of his property until the adjudication, and a bond has been given by the petitioning creditors, the property must be released to him upon his giving a bond in a sum which is fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property or pay the value thereof in money to the trustee in the event of his being adjudged a bankrupt pursuant to such petition.[10]

Where property of an alleged bankrupt has been seized and subsequently the petition in bankruptcy is dismissed, the debtor can only recover on the bond such costs, expenses and damages as were incident to the taking and withholding of the property, as distinguished from such as were incident to bankruptcy proceedings.[11]

§ 80. Appearing for the purpose of becoming a party to the proceedings.

Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.[1] This may be done more than four months after the act of bankruptcy was committed.[2] But a creditor will not be

[9] Marsh v. Armstrong, 20 Minn. 81, s. c. 11 N. B. R. 125; *In re* Havens, No. 6230, Fed. Cas., s. c. 8 Ben. 309; *In re* Marks, No. 9095, Fed. Cas., s. c. N. B. R. 575; *In re* Muller, No. 9912, Fed. Cas., s. c. Deady, 513.

[10] B. A. 1898, Sec. 69.

[11] Selkregg v. Hamilton Bros., 144 Fed. Rep. 556, 16 Am. B. R. 474; see also Kountze v. Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609.

[1] B. A. 1898, Sec. 59*f*; *In re* Bates Mach. Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A., 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288; *In re* Ryan, 114 Fed. Rep. 373, 7 Am. B. R. 562.

[2] *In re* Stein (C. C. A., 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288; *In re* Mammouth Pine Lumber Co., 109 Fed. Rep. 308, 8 Am. B. R. 651.

permitted to question the debtor's residence after he has acquiesced in an adjudication and filed his claim for allowance.[3] Creditors may join at any time before the adjudication and be counted to make up the number of creditors and the amount of claims required by the act.[4] The word creditor, as used in the bankrupt statute, includes anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[5]

A person who has no provable claim is not entitled to become a party for the purpose of opposing the prayer of the petition.[6] When a creditor intervenes for the purpose of joining in the petition he has a right to prosecute the original petition in the same manner as the petitioning creditors could have done.[7] When a creditor intervenes for the purpose of opposing the prayer of the petition he has the same right as any other party respondent.[8] A preferred creditor may so intervene without surrendering his preference.[9] An intervening creditor has a right to insist upon a trial, although the petitioning creditors may consent to continue the case.[10]

The proceedings may be conducted by the bankrupt in per-

[3] *In re* Hintze, 134 Fed. Rep. 141, 13 Am. B. R. 721.

[4] *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1,000, 13 Am. B. R. 665; *In re* Brett, 130 Fed. 981, 12 Am. B. R. 492; *In re* Romanow, 92 Fed. 510, 512, 1 Am. B. R. 461; *In re* Mercur, 95 Fed. 634, 2 Am. B. R. 626; *In re* Mackey, 110 Fed. 355, 363, 6 Am. B. R. 577.

[5] B. A. 1898, Sec. 1, clause 9. See also Sec. 66, *ante*.

[6] *In re* Columbia Real Estate Co., 112 Fed. Rep. 643, 7 Am. B. R. 441. As to what are claims, see "Provable Debts," Chap. XIII.

[7] *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Stein (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 5 Am. B. R. 288, 3 N. B. N. 428; *In re Ryan*, 114 Fed. Rep. 373, 7 Am. B. R. 562; *In re* Lacy, No. 7965, Fed. Cas., s. c. 12 Blatch. 322.

[8] Mattoon Nat. Bank v. First Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

[9] *In re* Moench & Sons Co., 123 Fed. Rep. 977, 10 Am. B. R. 590; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266.

[10] Knickerbocker Ins. Co. v. Comstock, No. 7879, Fed. Cas., s. c. 9 N. B. R. 484.

son in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court.[11] The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be endorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion.[11] Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.[11]

There is no objection to a person living without a district entering his appearance voluntarily. In such case the court has complete jurisdiction over him as though he had been legally served with process.[12] If a non-resident comes into the case for the purpose of proving a claim he thereby submits himself to the jurisdiction of the court irrespective of his place of residence.[13] He thereby makes himself a party to the proceedings, and is bound to take notice of and obey the orders of the court to the same extent as any other party. When a voluntary appearance has been entered it can not be withdrawn without permission of the court.[14]

§ 81. Schedules.

It is the duty of the bankrupt to prepare and make oath to and file in court within ten days, unless further time is

[11] Gen. Ord. 4.

An attorney at the time of filing the petition not admitted to practice will not be recognized; *In re* O'Halloran, No. 10463, Fed. Cas., s. c. 8 Ben. 128.

[12] *In re* Kirtland, No. 7851, Fed. Cas., s. c. 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355.

[13] *In re* Kyler, No. 7956, Fed. Cas., s. c. 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., s. c. 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson, 23 Fed. Rep. 483.

[14] *In re* Ulrich, No. 14327, Fed. Cas., s. c. 3 Ben. 355; see also U. S. v. Curry, 6 How. 106, 12 L. Ed. 363; Eldred v. Mich. Ins. Bank, 17 Wall. 545, 21 L. Ed. 685.

granted, after the adjudication, if an involuntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to.[1]

He is required to file this schedule in triplicate, one copy for the clerk, one for the referee, and one for the trustee.[1] The form of schedule is the same as involuntary proceedings.[2] The remarks that have already been made in regard to schedules in voluntary petitions apply equally to proceedings in involuntary bankruptcy.

There is one class of cases, however, in which a special provision is made in the general orders, which relates solely to involuntary proceedings. When the bankrupt is absent or can not be found, it is the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor.[3] If the debtor is found and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.[3]

§ 82. Pleading to the petition.

As soon as a petition in bankruptcy is filed and the respondent is served with process, he should consider his response to such petition. The bankrupt or any creditor may appear and plead to the petition within ten days after the return day or within such further time as the court may

[1] B. A. 1898, Sec. 7, clause 8.

[2] See note at the end of Form No. 3. See Sec. 60, *ante*.

[3] Gen. Ord. 9.

allow,[1] but creditors cannot be compelled to intervene.[2] Where a respondent waives service and files a written admission of the truth of the allegations of the petition, no adjudication can be made until after the expiration of the ten days within which creditors may intervene.[3] Any creditor with a provable claim may intervene to join in the petition,[4] or for the purpose of opposing the prayer of the petition.[5] When a creditor so intervenes he has the same right as any other party and may file an answer if a respondent.[5] Although the statute does not expressly require a written demurrer, plea or answer, it evidently contemplates a formal written pleading of some kind.

In what way the bankrupt or creditor may properly plead to the petition depends upon the circumstances in each particular case. Where the averments of the petition are not sufficiently precise and distinct the debtor may file exceptions, declining to answer upon that ground and ask that the allegations be made more definite and certain or be stricken out.[6] If the averments are not sufficient in law to sustain the proceedings he may demur,[7] or may move to dismiss the peti-

[1] B. A. 1898, Sec. 18*b*; *In re* Mackey, 110 Fed. Rep. 355, 6 Am. B. R. 577.

[2] *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119.

[3] *In re* Humbert Co., 100 Fed. Rep. 439, 4 Am. B. R. 76; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[4] *In re* Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112. See Sec. 80, *ante*.

[5] Mattoon Nat. Bank v. 1st Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Goldman v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* C. Moench & Sons Co., 123 Fed. Rep. 977, 10 Am. B. R. 590.

In Neustadter v. Dry Goods Co., 96 Fed. Rep. 830, 3 Am. Bankr. R. 96, it was said that "There is no right given to other creditors to come in and take the conduct of the case out of the hands of the original petitioners, and it cannot reasonably be presumed that Congress intended to authorize different creditors to come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual."

[6] *In re* Randall, No. 11551, Fed. Cas., s. c. Deady, 557.

[7] In re Benham, 8 N. B. R. 94; Orem v. Harley, No. 10567, Fed Ces., s. c. 3 N. B. R. 263.

tion.[8] He should, however, consider before making any of these dilatory pleas whether he desires a jury trial as to insolvency. If he desires a trial by jury of this question, it is necessary to file a written application therefor at or before the time within which the answer may be filed.[9] If no such application is filed within such time, a trial by jury is deemed to have been waived.[9] It seems that a debtor may file objections by way of demurrer and an answer at the same time and thus obtain a jury trial.[10] Where a demurrer or exceptions or a motion to dismiss is filed, it should be set down for hearing and disposed of before proceeding further in the case. If either a demurrer, motion or exception is sustained the court will ordinarily allow the petition to be amended.[11] If it is overruled the court will allow the respondent to answer within a time fixed in the order.

As soon as the petition is adjudged to be correct, or is made so by amendment, or when no dilatory pleading is resorted to, the debtor should put in his defense, if any, on the merits. This is regularly done by answer, which is treated in the next section.

By pleading to the merits in the first instance he waives objection to formal defects in the petition which do not go to the jurisdiction of the court.[12]

§ 83. The answer.

The general defense to a petition in bankruptcy is regularly put in by answer. The answer is entitled in the court in which the petition is filed followed by a caption or style of the proceedings as it appears upon the docket. The commence-

[8] *In re* Melick, No. 9399, Fed. Cas., s. c. 4 N. B. R. 97.

[9] B. A. 1898, Sec. 19.

[10] *In re* Nickodemus, No. 10254, Fed. Cas., s. c. 3 N. B. R. 230.

[11] See Amendments, Sec. 63, *ante;* Gen. Ord., 11.

[12] Leidigh Carriage Co. v. Stengel (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 1 N. B. N. 387, 2 Am. B. R. 383; Simonson v. Sinsheimer (C. C. A., 6th Cir.), 95 Fed. Rep. 948; *In re* Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re* Cliffe, 2 Am. B. R. 317, 94 Fed. Rep. 354; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

ment of the answer may be in substantially these words: "And now the said X. Y., respondent (*or,* intervening creditor, *as may be*), appears and for answer" admits, denies or says, *as may be*. The answer usually admits the allegations of the petition which are true, if any, before stating the defenses.

The defense is then set forth. Each defense must be specifically stated. The true object of pleading at law, in equity or in bankruptcy, is to narrow the controversy to the point or points really in dispute between the parties. No greater latitude in pleading should be allowed the defense in a petition in bankruptcy than in ordinary actions or suits.[1]

In order to maintain bankruptcy proceedings to have a debtor adjudged a bankrupt it must appear from the petition that the debtor has committed an act of bankruptcy within four months prior to the filing of such petition.[2] It is also stated in the petition that the debtor is insolvent,[3] but unless the act of bankruptcy is that covered by Sec. 3*a*, clause 1, this allegation is superfluous;[4] that he owes debts to the amount of one thousand dollars and is otherwise subject to be adjudged an involuntary bankrupt;[5] that he has had his principal place of business, resided or had his domicile within the

[1] *In re* Sutherland, No. 13638, Fed. Cas., s. c. Deady, 344.

In re Bradley Timber Co. v. White (C. C. A., 5th Cir.), 121 Fed. Rep. 779, 10 Am. B. R. 329, the court said:

"The plaintiff in error also contends that the court erred in striking from the files the first answer filed by the Bradley Timber Company, but we think that in this he can hardly be serious, because the said answer seems obnoxious on all the grounds alleged in the motion to strike. The alleged answer does not conform to the form for answers prescribed by the United States Supreme Court orders. It is prolix, and admixed with supposed grounds of the demurrer to the original petition, which had already been disposed of by the court. It is not properly verified, and it did not admit, nor unevasively deny, upon the oath of a competent person, the material facts alleged in the petition. Besides, another answer was filed. See Campbell v. Haverhill, 155 U. S. 610, 39 L. Ed. 280."

[2] B. A. 1898, Sec. 3*b*.

[3] B. A. 1898, Sec. 3*b*, and Form No. 3.

[4] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[5] B. A. 1898, Sec. 4*b*.

territorial jurisdiction of the court for the greater portion of the preceding six months; or, if against a person residing without the United States, that he has property within the territorial jurisdiction of the court.[6] The defense set up may go to any of these matters and there may be several defenses to any one of them.[7] In such case the defenses must be separately pleaded.[8] Unless all the essential facts required by the petition concur, the petitioners have no right to prosecute the petition, and it must be dismissed.

The principal defense consists in a denial that the debtor has committed the act or acts of bankruptcy complained of in the petition. When the petition alleges two or more acts of bankruptcy and one of them is established by proof, it is sufficient. The answer, therefore, should deny each act separately. This defense is regularly made by the general denial provided for in form No. 6, which is in these words: "And now the said X. Y. appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged." When this defense is made the answer should conclude according to whether the debtor wishes the question tried by the court or a jury in substantially these words: "and this he prays may be inquired of by the court," *or* "he demands that the same may be inquired of by a jury." If this defense is established by proof the petition must be dismissed.

The question of how far a plea of solvency is a defense to an involuntary petition was considered by the supreme court in West Co. v. Lea.[9] It is a complete defense to the first act of bankruptcy to show solvency at the time the peti-

[6] B. A. 1898, Sec. 2, clause 1.

[7] *In re* Paige, 99 Fed. Rep. 538, 3 Am. B. R. 679; Mather v. Coe, 92 Fed. Rep. 333, 1 Am. B. R. 504; *In re* Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112.

[8] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; Silverman's case, No. 12855, Fed. Cas., s. c. 1 Saw. 410; *In re* Sutherland, No. 13638, Fed. Cas., s. c. Deady, 344; *In re* Finlay, No. 4789, Fed. Cas., s. c. 5 Biss. 480.

[9] 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

tion is filed.[10] It is a complete defense to the second and third classes of acts of bankruptcy and to that part of the fourth class which relates to receivers to show solvency at the time the acts were committed.[11] It was directly ruled in West Co. *v.* Lea that a deed of general assignment for the benefit of creditors is made by the bankrupt act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed without reference to his solvency at the time of the filing of the petition and a denial of insolvency is not a defense. Under the fifth class of acts the debtor has admitted his insolvency at the time of committing the act of bankruptcy and solvency at the time of filing the petition is no defense.[12]

A person against whom an involuntary petition has been filed is entitled to have a trial by jury in respect to the question of his insolvency, where the question is material, except as otherwise provided in the act, and any act of bankruptcy alleged in such petition to have been committed upon filing a written application therefor at or before the time within which an answer may be filed.[13] If such application is not filed within such time, a trial by jury will be deemed to have been waived.[13] This right is limited to the bankrupt and is not extended to intervening creditors contesting such issues.[14]

The answer may also deny that the petitioners or any one of them is a creditor owning a provable debt,[15] or that the

[10] B. A. 1898, Sec. 3*c*.

[11] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123, 2 N. B. N. 531. See also *In re* Coddington, 118 Fed. Rep. 281, 9 Am. B. R. 243.

[12] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[13] B. A. 1898, Sec. 19. See also *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160.

[14] *In re* Herzikopf, 121 Fed. Rep. 544, 9 Am. B. R. 745.

[15] *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425; Hill v. Levy, 98 Fed. Rep. 94, 3 Am. B. R. 374; *In re* Big Meadows Gas Co., 113 Fed. Rep. 974, 7 Am. B. R. 697.

In re Manhattan Ice Co., 114 Fed. Rep. 400, note, 7 Am. B. R. 400, note. The following opinion was handed down May 21, 1901, by Brown, District Judge: "The practice in this district is that a credi-

debts claimed by the petitioning creditors amount to five hundred dollars,[16] or that his total indebtedness amounts to one thousand dollars; or he may set up a set-off for the purpose of reducing the amount of such debts to less than five hundred dollars,[17] or may aver that the debts claimed are barred by the statute of limitations;[18] or may challenge the jurisdiction of the court,[19] or plead infancy,[20] or that the debtor was *non compos mentis* at the time the alleged act of bankruptcy was committed.[21] In those estates where a married woman has no separate property rights and cannot contract debts she may defend on the plea of coverture.[22]

Where the petition is filed by one creditor and the defense is that there are more than twelve creditors, the act requires that "there shall be filed with the answer a list under oath of all the creditors with their addresses,[23] and thereupon the court shall cause all such creditors to be notified of the pendency of such petition, and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard."[24] The service of the notice on the creditors as provided by the act

tor having a provable debt may be a petitioning creditor, though the debt is unliquidated. These creditors evidently have a present fixed debt to some amount. Only a trial can determine the amount of the debts. If insufficient in amount, the petition will be dismissed, unless others join. The defense must be taken by answer. Motion denied."

[16] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; *In re* Cal. Pac. R. Co., No. 2315, Fed. Cas., 3 Saw. 240.

[17] *In re* Osage, etc., R. Co., No. 10592, Fed. Cas., s. c. 9 N. B. R. 281; *In re Skelley*, No. 12921, Fed. Cas., s. c. 3 Biss. 260; *In re* Sheehan, No. 12738, Fed. Cas., s. c. 8 N. B. R. 353.

[18] *In re* Cornwall, No. 3250, Fed. Cas., s. c. 9 Blatch. 114.

[19] *In re* Williams, No. 17706, Fed. Cas., s. c. 14 N. B. R. 132.

[20] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232.

[21] *In re* Maroin, No. 9178, Fed. Cas., s. c. 1 Dill. 178; *In re* Pratt, No. 11371, Fed. Cas., s. c. 2 Low. 96; *In re* Weitzel, No. 17365, Fed. Cas., s. c. 7 Biss. 289; *In re* Murphy, No. 9946, Fed. Cas., s. c. 10 N. B. R. 48.

[22] *In re* Rachel Goodman, No. 5540, Fed. Cas., s. c. 5 Biss. 401; *In re* Howland, No. 6791, Fed. Cas., s. c. 2 N. B. R. 357.

[23] B. A. 1898, Sec. 59*d*; Gage & Co. v. Bell, 124 Fed. Rep. 371, 10 Am. B. R. 696.

[24] B. A. 1898, Sec. 59*d*.

should be made by some officer of the court.[25] If there are more than twelve creditors, the court may permit others to join in the petition at any time before the adjudication to make three petitioning creditors.[26]

A plea of payment, in whole or in part, of the debt of the petitioning creditor will not ordinarily defeat the petition for adjudication in bankruptcy.[27] If the debtor is insolvent he has no right to offer payment or the creditor to accept it. This would amount to a preference, which can be avoided by the trustee. There are, however, a few exceptions to this rule in which a plea of payment may be made as a defense to the petition. Thus, when there is only one creditor of the debtor payment may be pleaded.[28] When a payment has been made after the petition has been filed and before the trial, the receipt of such payment by the petitioning creditors has been held a waiver sufficient to defeat the adjudication if the payment was sufficient in amount to reduce the indebtedness below the minimum established by the act.[29]

The answer should be signed and verified [30] under oath by the person answering or his agent or attorney.

The answer is filed with the clerk of the court, and not with a referee. It should be filed within five days after the return day of the subpœna or within such further time as the court may allow.[31] A debtor is entitled to a reasonable time to answer an amended petition.[32]

[25] *In re* Tribelhorn (C. C. A., 2d Cir.), 137 Fed. Rep. 3, 14 Am. B. R. 491.

[26] B. A. 1898, Sec. 59*d*; *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665; *In re* Haff (C. C. A., 2d Cir.), 136 Fed. Rep. 78, 13 Am. B. R. 362.

[27] *In re* Ouimette, No. 10622, Fed. Cas., s. c. 1 Saw. 47; *In re* Williams, No. 17703, Fed. Cas., s. c. 1 Low. 406.

[28] *In re* Sheehan, No. 12738, Fed. Cas., s. c. 8 N. B. R. 353.

[29] *In re* Skelley, No. 12921, Fed. Cas., s. c. 3 Biss. 260.

[30] B. A. 1898, Sec. 18*c*.

[31] B. A. 1898, Sec. 18*b*.

[32] Lockman v. Lang, (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 12 Am B. R. 497.

§ 84. The order of proceeding where petitions are filed in different districts.

It is obvious that two or more petitions may be filed against the same debtor in different districts. In such cases [1] the first hearing is had in the district in which the debtor has his domicile,[1] and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed is first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than the first alleged, if such earlier act is charged in either of the other petitions; and in either case the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy retains jurisdiction over all proceedings therein until the same shall be closed.[1]

In case two or more petitions are filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, takes and retains jurisdiction over all proceedings in such bankruptcy until the same is closed; and if such petitions are filed in the same district, action is first had upon the one first filed.[1]

But the court so retaining jurisdiction must, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.[1]

[1] B. A. 1898, Sec. 32; Gen. Ord. 6; *In re* Elmira Steel Co., 109 Fed. Rep. 456, 5 Am. B. R. 484; *In re* Boston, etc., R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409.

In re Globe Sec. Co., 132 Fed. Rep. 709, 12 Am. B. R. 764 *note; In re* United Button Co., 12 Am. B. R. 761, 132 Fed. Rep. 378, s. c. 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re* Tybo Min. Co., 132 Fed. Rep. 697, 13 Am. B. R. 62, and 132 Fed. Rep. 978, 13 Am. B. R. 68; *In re* General Metals Co., 133 Fed. Rep. 84, 12 Am. B. R. 770.

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§ 85. The order of proceeding where two or more petitions are filed in the same court.

It is clear that a debtor having a large number of creditors is liable to have several petitions filed against him in the same court by different creditors. The same or different acts of bankruptcy may be alleged as a ground for having him adjudged a bankrupt.

Whenever two or more petitions have been filed by creditors against a common debtor, alleging several acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition is first heard and tried which alleges the commission of the earliest act of bankruptcy.[1] In case several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated and proceed to a hearing as upon one petition.[2] If an adjudication of bankruptcy is made upon either petition, or for the commission of a single act of bankruptcy, it is not necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.[2]

§ 86. The reply.

Where the answer contains simply a general denial or traverse of the allegations of the petition, no replication or reply

Co., 133 Fed. Rep. 568, 13 Am. B. R. 304, it was held that where the business transactions of two alleged bankrupt corporations organized in different jurisdictions are so intermingled as to be impossible of separation and the necessities of the case require that the entire joint estate be brought into one jurisdiction for the purpose of administration, the court which first, under proper pleadings and by proper process, acquires jurisdiction of the persons and possession of the property, may proceed to a final adjudication and determination of the rights of the creditors in the joint property.

[1] Gen. Ord. 7.

[2] Gen. Ord. 7. As to attorney's fees on consolidation, see *In re* McCracken & McLeod, 129 Fed. Rep. 621, 12 Am. B. R. 95.

is needed.[1] If the petitioning creditors wish to contest a defense raising new matter they must put in a replication and have a trial before an adjudication is made.[2] Where a case is submitted on petition and answer the allegations of the answer are taken to be true,[2] and if the adjudication is denied the debtor is entitled to a final decree dismissing the petition.[3] The reply may be filed on the day of the hearing.

It may be observed that where the answer contains pleas which are irrelevant and immaterial, it is proper to move to have them stricken out. If they are insufficient in law it has been held that the proper practice under the present statute and general orders is to set the case down for hearing upon petition and answer, as in equity, and that a demurrer to the answer is improper.[4]

§ 87. The hearing or trial.

If the bankrupt or any of his creditors appear within the time limited and controvert the facts alleged in the petition, a hearing or trial is had as soon as may be thereafter upon the issues presented by the pleadings.[1] It is the duty of the

[1] *In re* Dunham, No. 4143, Fed. Cas., s. c. 2 Ben. 488; *In re* Hawkeye Smelting Co., 8 N. B. R. 385.

[2] Mattoon Nat. Bank v. First Nat. Bank (C. C. A., 7th Cir.), 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 N. B. N. 929; Brinkley v. Smithwick, 126 Fed. Rep. 686, 11 Am. B. R. 500; *In re* Doddy, Jourdan & Co., 127 Fed. Rep. 771, 11 Am. B. R. 344; *In re* Waugh (C. C. A., 9th Cir.), 133 Fed. Rep. 281, 13 Am. B. R. 187.

[3] *In re* Waugh (C. C. A., 9th Cir.), 133 Fed. Rep. 281, 13 Am. B. R. 187.

[4] In Goldman, Beckman & Co. v. Smith, 93 Fed. Rep. 182, 1 Am. B. R. 266, Judge Barr said: "If we are to apply the rules of equity practice to proceedings in bankruptcy—and we understand these are to be applied (see Rule 37, Supreme Court), the sufficiency of an answer can not be raised by a demurrer, but can only be done by setting the case for hearing upon the bill and answer."

Consult as to the practice in equity, Banks v. Manchester, 128 U. S. 244, 32 L. Ed. 425; Walker v. Jack, 88 Fed. Rep. 576; Grether v. Wright, 75 Fed. Rep. 742, s. c. 23 C. C. A. 500.

[1] B. A. 1898, Sec. 18*d*; Mattoon Nat Bank. v. 1st Nat. Bank, 102 Fed. Rep. 728, 4 Am. B. R. 515, 2 47 L. Ed. 200, 9 Am. B. R. 50; N. B. N. 929; Leidigh Carriage Co. v. Stengel, 95 Fed. Rep. 637, 2 Am.

judge to determine the issues so made without the intervention of a jury, except in cases where a jury trial is given by the statute.[2] The case may be set for hearing by either party upon any day after the issues have been made at which it can be heard by the judge. He should serve notice upon the opposing party of the day of hearing or trial.

It is proper for a judge to refer the proceedings to a special master to take evidence and report. When the evidence has been taken and returned to the judge with the opinion of the special master, the judge will then consider the issues and determine the same. This method of taking testimony is the usual one in courts of equity, and the act does not provide that all the testimony shall be taken in the presence and hearing of the judge.[3]

The debtor is entitled to have a trial by jury in respect to the question of his insolvency and any act of bankruptcy alleged in the petition against him to have been committed upon filing a written application therefor at or before the time within which an answer may be filed. If any such written application is not filed within such time the debtor is deemed to have waived his right to trial by jury, and these questions are then determined by the judge.[4]

This right of jury trial is confined to the debtor. Creditors are not entitled to demand a jury trial on the question of the bankrupt's solvency,[5] or of the allowance of their claims.[6] The right to a trial by jury on written application of the alleged bankrupt is absolute and cannot be withheld at the

B. R. 383, 1 N. B. N. 387; *In re* Baumann, 96 Fed. Rep. 946, 3 Am. B. R. 196.

[2] B. A. 1898, Sec. 19*a*. See also Simonson v. Sinsheimer (C. C. A., 6th Cir.), 100 Fed. Rep. 426, 3 Am. B. R. 824; Bray v. Cobb, 91 Fed. Rep. 102; 1 Am. B. R. 153; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Morss v. Franklin Coal Co., 125 Fed. Rep. 998, 11 Am. B. R. 423.

[3] *In re* Lacov (C. C. A., 2d Cir.), 134 Fed. Rep. 237, 13 Am. B. R. 400.

[4] B. A. 1898, Sec. 18*d*. and Sec. 19*a*; *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160.

[5] *In re* Herzikopf (C. C. A., 9th Cir.), 121 Fed. Rep. 544, 9 Am. B. R. 745.

[6] *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R. 99.

discretion of the court.[7] In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common law cases.[7] In case a jury is waived by not demanding one in writing and an issue is submitted to a jury, the verdict is advisory only as in equity.[7*] The judge and not the referees should preside at a jury trial.

Where the bankrupt has seasonably demanded in writing a trial by jury, the issues may be tried before any jury in attendance upon the court. If a jury is not in attendance upon the court one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties, when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.[8]

Where the bankrupt has controverted other allegations of the petition in addition to those relating to his insolvency and commission of acts of bankruptcy, there is nothing in the statute prohibiting the court from submitting all the issues to the jury. Section 19*c* of the act would seem to be authority for such proceedings. It would also seem that the judge may submit the questions of insolvency and the commission of an act of bankruptcy, with proper instructions as to the other matters.[9]

At the hearing or trial the petitioners must establish by proof the truth of the facts alleged in the petition. The bur-

[7] Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

[7*] *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160.

[8] B. A. 1898, Sec. 19*b*.

[9] See Blue Mountain Iron & Steel Co. v. Portner (C. C. A., 4th Cir.), 131 Fed. Rep. 57, 12 Am. B. R. 559; Bean Chamberlain Mfg. Co. v. Standard Spoke and Nipple Co. (C. C. A., 6th Cir.), 131 Fed. Rep. 215, 12 Am. B. R. 610.

den of proof rests upon the petitioners in all cases,[10] except in respect to the question of insolvency. With reference to the question of solvency the burden of proof is regulated by the statute.[11] It declares that it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of section 3 to allege and prove that the party proceeded against was not insolvent, as defined in the statute, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt. Whenever a person against whom a petition has been filed, as hereinbefore provided under the second and third subdivisions of section 3, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him. If he does so attend, the burden is upon the petitioners.[12]

Where a bankrupt contests the debt of a petitioning creditor on the ground that it is illegal because founded on a gambling or wagering contract, the burden of proof is upon the bankrupt.[13]

The evidence is put in in the same manner as at any other

[10] *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232; *In re* Price, No. 11411, Fed. Cas., s. c. 8 N. B. R. 514; Brock v. Hoppock, No. 1912, Fed. Cas., s. c. 2 N. B. R. 7; *In re* Oregon Bulletin Co., No. 10559, Fed. Cas., s. c. 13 N. B. R. 503; Philpot v. O'Brion (C. C. A., 1st Cir.), 126 Fed. Rep. 167, 11 Am. B. R. 205; *In re* Foster, 126 Fed. Rep. 1014, 11 Am. B. R. 131; Troy Wagon Works v. Vastbinder, 130 Fed. Rep. 232, 12 Am. B. R. 352.

[11] B. A. 1898, Sec. 3*c* and 3*d*; West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[12] M'Gowan v. Knittel (C. C. A., 3d Cir.), 137 Fed. Rep. 453, 14 Am. B. R. 208.

[13] Hill v. Levy, 98 Fed. Rep. 94, 3 Am. B. R. 374, 2 N. B. N. 180. See also as to presumption of legality of contracts, Irwin v. Williar, 110 U. S. 507, 28 L. Ed. 225.

civil trial. The court may summon any person who is a competent witness to appear in court to be examined.[14] The right to take depositions at such a trial is determined by and enjoyed according to the United States laws in force at that time relating to the taking of depositions.[15] When the evidence in chief, evidence in reply and evidence in rebuttal has been introduced the case is closed and the arguments of counsel of the parties heard. The court submits the case to the jury with instructions as in a common law action. When there is no conflicting testimony the court may direct a verdict.[16] A scintilla of conflicting testimony is not sufficient to require a submission to the jury. The court has power to set aside a verdict upon the grounds recognized in other civil actions.[17] Where the case is submitted to the judge without the intervention of a jury the evidence is not usually introduced with the same formality as in a jury trial. In such case the court determines the issues presented by the pleadings upon the proofs after arguments of counsel, and either makes an adjudication of the bankruptcy or dismisses the petition.

§ 88. Order of adjudication.

If the facts set forth in the petition are sufficient and established by proof to be true, either by a jury or by the court, it is the duty of the court to adjudge the debtor to be a bankrupt.[1] An order of adjudication ought not to be made until the expiration of the time for creditors to intervene and op-

[14] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Woodward, No. 18000, Fed. Cas., s. c. 8 Ben. 112.

[15] B. A. 1898, Sec. 21*b*. The sections of the Revised Statutes which apply particularly to the right to take depositions are found in chap. 17 of the Revised Statutes relating to evidence and particularly sections 861 to 870. This subject has been quite fully discussed by the supreme court in an opinion by Mr. Justice Miller in *ex parte* Fisk, 113 U. S. 713, 28 L. Ed. 1117.

[16] Hardy v. Clark, No. 1420 Fed. Cas., s. c. 3 N. B. R. 385; *In re* Jelsh, No. 7257, Fed. Cas., s. c. 9 N. B. R. 412.

[17] *In re* Dunn, No. 41713, Fed. Cas., s. c. 12 Blatch. 42; *In re* De Forest, No. 2745, Fed. Cas., s. c. 9 N. B. R. 278.

[1] B. A. 1898, Sec. 18*c*.

pose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service.[2] An adjudication of bankruptcy against a partnership will be denied, where the existence of the partnership is put in issue by some of the members, until the existence of the partnership is established.[3] The form of adjudication of bankruptcy is prescribed by the supreme court in form No. 12. This order should be entered by the clerk of record. A mere memorandum not conforming substantially to this form is not an adjudication.[4]

When the debtor resists an adjudication and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor is entitled to recover and be paid out of the estate the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner.[5]

§ 89. Proceedings to set aside an adjudication.

An adjudication of bankruptcy which is correct in form and made by a district court having jurisdiction of the bankrupt is conclusive of the fact decreed.[1] Until vacated by a direct proceeding in the court of bankruptcy it is binding upon all the parties and cannot be attacked collaterally. Thus an adjudication by default on the ground that the bankrupt created a preference is conclusive against the bankrupt and

[2] *In re* Humbert Co., 100 Fed. Rep. 439, 4 Am. B. R. 76; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[3] *In re* McLaren, 125 Fed. Rep. 835, 11 Am. B. R. 141.

[4] Consult *in re* Hill, No. 6484, Fed. Cas., s. c. 7 Ben. 378; *In re* Boston, H. & E. R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409; B. A. 1898, Sec. 1, clause 2.

[5] Gen. Ord. 34.

[1] *In re* Billing, 145 Fed. Rep. 395; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Shawhan v. Wherritt, 7 How. 643, 12 L. Ed. 847; Sloan v. Lewis, 22 Wall. 150; Chapman v. Brewer, 114 U. S. 158, 22 L. Ed. 832; Graham v. Boston, H. & E. R. Co., 118 U. S. 161, 30 L. Ed. 196; *In re* Gretchell, No. 5371, Fed. Cas., s. c. 8 Ben. 256; *In re* Ives, No. 7115, Fed. Cas., s. c. 5 Dill. 146; *In re* McKinley, No. 8864, Fed. Cas., s. c. 7 Ben. 562; Lewis v. Sloan, 68 N. C. 557; Mount v. Manhattan Co., 41 N. J. Eq. 211.

the creditor preferred.[2] The court of bankruptcy is always open for a re-examination of its decrees in an appropriate form. Any order made in a case may be set aside and vacated on proper showing made, due regard being had to rights which have become vested under it and which will be disturbed by its revocation.

After the order has been formally entered an application may be made to set aside the adjudication and grant a new trial or hearing. The application is usually by motion. The court has power to grant such a motion in a proper case.[3] The party applying to set aside the adjudication must file his motion within a reasonable time after the order is entered.[4]

The motion to set aside the adjudication may be made by the bankrupt or a creditor.[5] Thus an attaching creditor or a creditor whose security is impeached as a preference,[6] but not a secured or a general creditor,[7] has such an interest as will entitle him to make such a motion.

It is not a sufficient ground for setting aside an adjudication in bankruptcy, where the debtor has admitted an act of bankruptcy, that the admission was not true,[8] or that a prior petition was pending in another district,[9] or on the ground that there was a misjoinder or a nonjoinder of cred-

[2] *In re* American Brewing Co., 112 Fed. Rep. 752, 7 Am. B. R. 463.

[3] *In re* Dunn, No. 4173, Fed. Cas., s. c. 12 Blatch. 42; *In re* De Forest, No. 3745, Fed. Cas., s. c. 9 N. B. R. 278; *In re* Great Western Telegraph Co., No. 5739, Fed. Cas., s. c. 5 Biss. 359.

[4] *In re* Neilson, No. 10090, Fed. Cas., s. c. 7 N. B. R. 505; Leiter v. Payson, No. 8226, Fed. Cas., s. c. *In re* Schenectady Eng. & Const. Co., 127 Fed. Rep. 782, 11 Am. B. R. 643; *In re* Ives, 111 Fed. Rep. 405, 6 Am. B. R. 633; *In re* Urban & Suburban Realty Title Co., 132 Fed. Rep., 140, 12 Am. B. R. 687; *In re* Billing, 145 Fed. Rep. 395.

[5] *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[6] *In re* Derby, No. 3815, Fed. Cas., s. c. 6 Ben. 232; Fogarty v. Gerrity, No. 4895, Fed. Cas., s. c. 1 Saw. 233.

[7] *In re* Bush, No. 2222, Fed. Cas., s. c. 6 N. B. R. 179; Karr v. Whittaker, No. 7613, Fed. Cas., s. c. 5 N. B. R. 123. See Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

[8] *In re* Thomas, No. 13891, Fed. Cas., s. c. 11 N. B. R. 330; Lea v. West Co., 91 Fed. Rep. 237, 1 Am. B. R. 261.

[9] *In re* Harris, No. 6111, Fed Cas., s. c. 6 Ben. 375.

itors who filed the petition, unless there is proof that the adjudication was obtained by fraud or in bad faith.[10]

§ 90. Order of reference.

At the time of making the order adjudging the debtor to be bankrupt the court regularly refers[1] the case for subsequent proceedings to a referee within the county of which the debtor is a resident or has his principal place of business. It may refer the case to any referee within the territorial jurisdiction of the court if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.[2]

All the proceedings thereafter except as required by the statute or by the general orders to be had before a judge, are had before the referee,[3] subject to be reviewed by the judge.[4] Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state must be heard and decided by the judge.[5] But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.[5] A person claiming to be the owner of property in the hands of the trustee is entitled to a jury trial and cannot be compelled to submit his claims to a referee.[6] Upon the filing of an answer to an involuntary petition in bankruptcy it is quite usual to have one of the

[10] *In re* McKinley, No. 8864, Fed. Cas., s. c. 7 Ben. 562; *In re* Duncan, No. 4131, Fed. Cas., s. c. 8 Ben. 365; *In re* Funkenstein, No. 5158, Fed. Cas., s. c. 3 Saw. 605.

[1] Order of Reference, Official Form No. 14, Form No. 31, *post.*

[2] B. A. 1898, Sec. 22.

In re Schenectady Eng. & Const. Co., 147 Fed. Rep. 868, it was held that: "This section refers to the referees in bankruptcy appointed within the district where the case is pending, and the court has no jurisdiction or power to refer the case to a referee appointed by and residing in another district."

[3] Gen. Ord. 12.

[4] Gen. Ord. 27.

[5] Gen. Ord. 12.

As to the power to grant injunctions, see Sec. 29, *ante.*

[6] *In re* Russell (C. C. A., 2d Cir.), 101 Fed. Rep. 248, 3 Am B. R. 658.

referees take the evidence and report upon the various questions presented.[7]

The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee, and from that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.[8]

A copy of the order must forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. The time when and the place where the referee shall act upon the matters arising under the several cases referred to him shall be fixed by special order of the judge, or by the referee; and at such times and places the referee may perform the duties which he is empowered by the act to perform.[8]

§ 91. Proceedings on default.

If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge on the next day, if present, or as soon thereafter as practicable, makes the adjudication or dismisses the petition.[1]

If the judge is absent from the district or the division of the district in which the petition is pending on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk must forthwith refer the case to the referee.[2] In such cases the referee is authorized to consider all such petitions and make the adjudications or dismiss the petitions,[3] with the same effect as if the order had been made by the judge. The referee is not authorized to make an adjudication in other

[7] Clark v. American Mfg., etc., Co. (C. C. A., 4th Cir.), 101 Fed. Rep. 962, 4 Am. B. R. 351.

[8] Gen. Ord. 12.

[1] B. A. 1898, Sec. 18*c*.

[2] B. A. 1898, Sec. 18*f*; Official Form No. 15, Form No. 32, *post*.

[3] B. A. 1898, Sec. 38, clause 1.

cases. An adjudication made after the debtor or any creditor has failed to file pleadings is as binding as one made upon a trial or hearing, unless set aside by order of the court.[4]

An application to set aside a default adjudication, should be made to the judge and not the referee.[5]

§ 92. Amendments in involuntary proceedings.

The court may, upon proper application, allow amendments to the petition and schedules.[1] Such applications are addressed to the judicial discretion of the court. Mere formal amendments may be asked in open court at the time of the hearing or trial and allowed, when justice may be done by so doing, even after all the testimony in the case has been taken.[2]

When new matter is sought to be introduced, leave must be first obtained of the court to file the amendment. The application is regularly made by petition or motion. It should be accompanied by a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions or schedules.[3] If the amendments are made to separate schedules the same must be made separately with proper references.[3] The amendment should state no more of the original paper than may be absolutely necessary to introduce and make intelligible the new matter, which should alone constitute the chief subject of the

[4] *In re* American Brewing Co., 112 Fed. Rep. 752, 7 Am. B. R. 463; *In re* Le Favour, No. 8208, Fed. Cas., s. c. 8 Ben. 43.

As to the binding force of a decree in equity *pro confesso*, see Thomson v. Wooster, 114 U. S. 104, 29 L. Ed. 105.

[5] *In re* Imperial Corporation, 133 Fed. Rep. 73, 13 Am. B. R. 199.

[1] Gen. Ord. 11.

[2] *In re* Bininger, No. 1420, Fed. Cas., c. s. 7 Blatch. 262; *In re* Craft, No. 3316, Fed. Cas., s. c. 2 Ben. 214; *In re* Haughton, No. 6223, Fed. Cas., s. c. 1 N. B. R. 460; *In re* Gallinger, No. 5202, Fed. Cas., s. c. 1 Saw. 224.

Formal defects are usually waived by answering on the merits, *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; Leidigh Carriage Co. v. Stengel (C. C. A., 6th. Cir.), 95 Fed. Rep. 637, 2 Am. B. R. 383; Simonson v. Sinsheimer (C. C. A., 6th Cir.), 95 Fed. Rep. 948; Green River Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[3] Gen. Ord. 11.

amendment. The application for leave to amend must state the cause of the error in the paper originally filed.[3] In other words, it must be shown that the petitioner or his attorney had no knowledge of and could not have ascertained with reasonable diligence the facts sought to be added by the amendment at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake or other reason which would excuse such omission.[4] The application for leave to amend must be made within a reasonable time after the discovery of such facts.[5] A copy of the petition and amendment should be served upon the adverse party.

The granting or refusing to grant leave to amend rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed.[6] The courts, in allowing such amendments, are governed by substantially the same principles which apply to similar cases in other courts. Leave to amend may be granted on terms, as upon payment of costs.[7]

An amendment may be allowed at any stage in the proceedings as justice may require. The power of the court is not limited in this respect. A petition may be amended at the trial,[8] or before a new trial,[9] or an appellate court may re-

[3] Gen. Ord. 11.

[4] White v. Bradley Timber Co., 116 Fed. Rep. 768, 8 Am. B. R. 671; Wilder v. Watts, 138 Fed. Rep. 426, 15 Am. B. R. 57; *In re* Hark, 142 Fed. Rep. 279, 15 Am. B. R. 460.

[5] *In re* Freudenfels, No. 5112*a*, Fed. Cas.

[6] *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665; *In re* Shoesmith (C. C. A., 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232, 2 N. B. N. 85; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re* Cliffe, 94 Fed. Rep. 354, 2 Am. B. R. 317; *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140.

[7] *In re* Howland, 6791 Fed. Cas., s. c. 2 N. B. R. 357; *In re* Strait (Ref.), 2 Am. B. R. 308; *In re* Riggs Restaurant Co. (C. C. A., 2d Cir.), 130 Fed. Rep. 691, 11 Am. B. R. 508.

[8] *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232; Chicago Motor Vehicle Co. v. Leather Co. (C. C. A., 7th Cir.), 141 Fed. Rep. 518, 15 Am. B. R. 804.

[9] *In re* Hark, 142 Fed. Rep. 279, 15 Am. B. R. 460.

mand a case with leave to allow the petition to be amended.[10] Leave to amend will not be granted for the purpose of adding a member of a firm as a new party after all the evidence has been taken and the case is before the court for final hearing.[11]

An amended petition cannot be filed as an original petition by erasing "amended" after execution.[12]

Where a petition fails to properly aver jurisdictional facts the defect may be cured by amendment,[13] or the petition may be dismissed.[14] Jurisdiction in bankruptcy comes from the statute and is not conferred by the accuracy and precision of the averments made in the petition. An amendment may be allowed to set forth the jurisdictional facts existing at the time the petition was filed. A petition may be amended to show that the debtor is not within one of the excepted classes, as a wage earner or farmer,[15] or to allow petitioning creditors to join in a petition averring less than twelve creditors when it appears from the answer that there are more than twelve creditors,[16] or to show that the provable claims owned by the petitioning creditors in the aggregate amount to $500, or to permit petitioning creditors to join for the purpose of making the amount of provable claims equal to $500,[17] or

[10] *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665; Taft & Co. v. Century Savings Bank (C. C. A., 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 594.

[11] *In re* Pitt, 11188 Fed. Cas., s. c. 8 Ben. 389.

[12] *In re* Hyde & Gload Mfg. Co., 103 Fed. Rep. 617, 4 Am. B. R. 602.

[13] *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

[14] Woolford v. Diamond State Steel Co., 138 Fed. Rep. 582, 15 Am. B. R. 31.

[15] *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 245; Beach v. Macon Grocery Co. (C. C. A., 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762; *In re* Brett, 12 Am. B. R. 492, 130 Fed. Rep. 981; *In re* White, 135 Fed. Rep. 199, 14 Am. B. R. 241; *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310.

[16] *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665; *In re* Haff (C. C. A., 2d Cir.), 136 Fed. Rep. 78, 13 Am. B. R. 362.

[17] *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 469.

But see *In re* Stein, 130 Fed. Rep. 377, 12 Am. B. R. 364, disapproved *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

to permit an amendment so as to show that the debtor owed at least $1,000,[18] or to allege the insolvency of partners, where the original petition alleged that "the partnership is insolvent." [19]

An amendment to a petition in bankruptcy relates back to the day of filing the original petition, and has the same force and effect as if included in that petition.[20] For this reason an original petition may be amended by setting out therein an act of bankruptcy, which occurred more than four months before the application for leave to amend, provided the act of bankruptcy was committed within four months before filing the petition.[21] Where the original petition charged that a transfer was made with intent to delay, hinder or defraud creditors it may be amended to charge the same transfer to be a preference.[22] When the proof discloses acts of bankruptcy not averred in the original petition the petition may be amended to conform to the proof.[23] Where two or more petitions are filed against the same individual in different districts, the petition filed in the district of his domicil may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions, but not subsequent acts.[24] This limitation does not apply to amendments in other cases. An

[18] Taft Co. v. Century Savings Bank (C. C. A., 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 594.

[19] *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588.

[20] *In re* Shoesmith (C. C. A., 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645; International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866.

[21] *In re* Shoesmith (C. C. A., 7th Cir.), 135 Fed. Rep. 684, 13 Am. B. R. 645.

But see *In re* Haff (C. C. A., 2d Cir.), 136 Fed. Rep. 78, 13 Am. B. R. 362.

[22] *In re* Hark, 142 Fed. Rep. 279, 15 Am. B. R. 460; *In re* Henderson, 9 Fed. Rep. 196.

[23] *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140; *In re* Mercur, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232; *In re* Hark, 142 Fed. Rep. 279, 15 Am. B. R. 460.

[24] Gen. Ord. 6. *In re* Sears (C. C. A., 2d Cir.), 117 Fed. Rep. 294, 8 Am. B. R. 713.

See also *In re* Riggs Restaurant Co. (C. C. A., 2d Cir.), 130 Fed. Rep. 691, 11 Am. B. R. 508.

amendment setting up new acts of bankruptcy ought not to be allowed until the petitioners show good reason why these acts were omitted from the original petition or in some way excuse the omission.[25] Where an amendment to a petition alleges new acts of bankruptcy, the respondent is entitled to a reasonable time to file his answer.[26]

Where the verification is defective it may be amended.[27] Supplemental affidavits may be filed to show an agent's authority to sign and verify the petition.[28]

Where a petition is referred to a referee to make the adjudication he may also allow amendments to the petition. He is expressly authorized and it is his duty to examine all schedules of property and lists of creditors filed by bankrupts and to cause such as are incomplete and defective to be amended.[29] The referee may also refuse to allow an amendment. Whether he grants or refuses an amendment to be made, the question is subject to review by the judge.[30]

§ 93. Dismissing a petition.

After an involuntary petition has been filed in court it can not be dismissed by the petitioning creditors or for want of prosecution or by consent of parties until after notice to the creditors.[1]

The court may dismiss a petition by consent of the peti-

[25] White v. Bradley Timber Co., 116 Fed. Rep. 768, 8 Am. B. R. 671; Wilder v. Watts, 138 Fed. Rep. 426, 15 Am. B. R. 57; *In re* Hark, 142 Fed. Rep. 279, 15 Am. B. R. 460.

[26] Lockman v. Lang (C. C. A., 2d Cir.), 132 Fed. Rep. 1, 12 Am. B. R. 497.

[27] *In re* Simmons, 12864 Fed. Cas., s. c. 10 N. B. R. 253; *In re* Sargent, 12361 Fed. Cas., s. c. 13 N. B. R. 144; *In re* Cal. Pac. R. Co. No. 2315 Fed. Cas., s. c. 3 Saw. 240; *In re* Donnelly, 5 Fed. Rep. 783; *In re* Nelson, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re* Vastbinder, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310.

[28] *In re* Rosenfields, No. 12061 Fed. Cas., s. c. 11 N. B. R. 86.

[29] B. A. 1898, Sec. 39, clause 2; *In re* Miller, 104 Fed. Rep. 764, 5 Am. B. R. 140.

[30] Gen. Ord. 27.

[1] B. A. 1898, Secs. 59*g* and 58*a*. *In re* Pymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

tioning creditors after the time has expired within which other creditors may intervene to join in the petition or to be heard in opposition to it. The reason is that the notice required by Sec. 58*a* is to be given to the creditors of the bankrupt as they appear in the papers in the case. If no other creditors appear in the papers in the case, the alleged bankrupt [2] or the petitioning creditors may dismiss the petition for want of prosecution or by consent. Such a dismissal is valid though there are other creditors and they have received no notice of the proceedings. Such creditors may move to have the proceedings reinstated, but must do so within a reasonable time.[3] A petition will not be dismissed if one of the petitioning creditors objects to such dismissal.[4] The court will not permit a petitioning or intervening creditor to withdraw to reduce the amount of debts represented on the petition below the jurisdictional amount.[5] A creditor has been permitted to withdraw where he was misled or there was a mistake of fact.[6] It has been held that the provisions of the bankrupt act with reference to notice to creditors before dismissal of proceedings relates to dismissals by consent of parties and not by order of court after a hearing on the merits.[7] Where a petition had been dismissed without notice to creditors and creditors thereafter petition to re-open the case their application was denied with leave to institute new proceedings.[7] The rule was otherwise under the former acts.[8]

The death of a person against whom an involuntary petition has been filed after the service of the subpœna and before

[2] *In re* Levi & Klauber (C. C. A. 2d Cir.), 15 Am. B. R. 294, 142 Fed. Rep. 962.

[3] *In re* Jemison Mercantile Co. (C. C. A., 5th Cir.), 112 Fed. Rep. 966, 7 Am. B. R. 588; *In re* Plymouth Cordage Co. (C. C. A., 8th Cir.), 135 Fed. Rep. 1000, 13 Am. B. R. 665.

[4] *In re* Cronin, 98 Fed. Rep. 584, 3 Am. B. R. 552; *In re* Lewis, 129 Fed. Rep. 147, 11 Am. B. R. 683.

[5] *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Quincy Granite Quarries Co., 147 Fed. Rep. 279.

[6] *In re* Coburn, 126 Fed. Rep. 218, 11 Am. B. R. 212.

[7] Neustadter v. Dry Goods Co., 96 Fed. Rep. 830, 3 Am. B. R. 96.

[8] *In re* Camden Rolling Mill Co., No. 2338 Fed. Cas., s. c. 3 N. B. R. 590.

the return day does not authorize a dismissal of the petition.[8] If the court is satisfied that a petition in involuntary bankruptcy was not presented in good faith, or for sinister, oppressive and vexatious purposes, it has power to dismiss the proceedings after notice to the creditors.[10] The court may dismiss the petition upon condition that the majority of the creditors desiring a dismissal give security for the payment of the debts of the objecting creditors.[11]

§ 94. Involuntary proceedings as to grounds for a suit for damages.

Proceedings by a creditor to force a debtor into bankruptcy cannot be resorted to as proceedings *in terrorem* for the purpose of collecting a debt. The malicious institution of such proceedings in bankruptcy may be the foundation for an action for damages sustained.[1] In order to maintain an action for damages it is necessary to allege and prove that the proceedings were instituted maliciously and without probable cause and terminated without an adjudication in bankruptcy.[2] It is not necessary to allege or prove that there was an actual seizure of the debtor's property.[3]

§ 94a. Costs.

Where a petition is contested the petitioning creditors if successful may recover the same costs that are allowed to a party recovering in a suit in equity; and if the petition is

[8] *In re* Hicks, 107 Fed. Rep. 910, 6 Am. B. R. 182; Shute v. Patterson (C. C. A., 8th Cir.), 147 Fed. Rep. 509.

[10] *In re* Hamlin, 5994 Fed. Cas., s. c. 8 Biss. 122. See also *Ex parte* Ashworth, 18 L. R. Eq. 705; *Ex parte* Harcourt, 2 Rose 203; *Ex parte* Bourne, 2 Glyn. & J. 137.

[11] *In re* Indianapolis, etc., R. C., No. 7023 Fed. Cas., s. c. 5 Biss. 287.

[1] Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. Rep. 218, 15 Am. B. R. 554; Farley v. Danks, 4 El. & Bl. 493; Chapman v. Pickersgill, 2 Wilson, 145; Cooley on Torts, 187; Addison on Torts, 867.

[2] Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116, reversing No. 13176 Fed. Cas., s. c., 2 Woods, 599; Whitworth v. Hall, 2 B. & Ad. 695.

[3] Wilkinson v. Goodfellow-Brooks Shoe Co., 141 Fed. Rep. 218, 15 Am. B. R. 554.

dismissed the debtor may recover like costs against the petitioners.[1] But this does not authorize the taxation of attorneys' fees.[2] Upon an application for a warrant of seizure the court may allow attorneys' fees as costs of the proceedings when the petition is dismissed.[3] Witness fees must be paid according to statute; one dollar and fifty cents per day for actual attendance and mileage.[4] No allowance will be made for expert witnesses.[4]

Where an adjudication is made the petitioning creditors are entitled to have the deposit of thirty dollars refunded to them out of the estate.[5] It is competent for the court to make a reasonable allowance as indemnity for costs and expenses in preserving the estate,[6] but no such allowance will be made for vain attempts to discover concealed assets made at the suggestion of the attorney for the creditors and against the objection of labor claimants, whose claims will exhaust the entire estate.[7] A person cannot recover expenses and costs incurred by him in an attachment suit to enforce a lien, which was invalidated by the bankruptcy proceedings.[8] An assignee is entitled to pay for services in a state assignment proceedings when the property is subsequently administered in bankruptcy.[9]

The costs and expenses of administration of an estate in

[1] Gen. Ord. 34; *In re* Haeseler-Kohlhoff Carbon Co., 135 Fed. Rep. 867, 14 Am. B. R. 381.

[2] *In re* Ghiglione, 93 Fed. Rep. 186, 1 Am. B. R. 580. As to attorneys' fees, see Sec. 41*a*, *ante*.

[3] *In re* Abraham, 93 Fed. Rep. 767 (785), 2 Am. B. R. 266. As to attorneys' fees, see Sec. 41*a*, *ante*.

[4] *In re* Carolina Cooperage Co., 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23.

[5] *In re* Silverman, 97 Fed. Rep. 325, 4 Am. B. R. 83, 2 N. B. N. 760; *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 419.

[6] *In re* Carolina Cooperage Co., 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23; *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 758, 2 N. B. N. 599.

[7] *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830, 2 N. B. N. 787.

[8] *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673; *In re* Copper King, 144 Fed. Rep. 689; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 587.

But see *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Goldberg & Bros., 144 Fed. Rep. 566.

[9] Randolph v. Scrugg, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R.

bankruptcy must be paid out of the estate before there is any distribution to creditors.[10]

The petitioning creditors who have procured the appointment of a receiver may be required to pay the costs incurred by such receivership upon the dismissal of the petition.[11]

§ 95. Proceedings subsequent to the adjudication.

Proceedings in involuntary bankruptcy subsequent to the order of adjudication and reference are not different from the proceedings had upon a voluntary petition or a petition for the purpose of having a partnership or the members thereof adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of the trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate will be considered hereafter under appropriate heads.

1; *In re* Pauly (Ref. Op.), 2 Am. B. R. 333; *In re* Scholtz, 106 Fed. Rep. 834, 5 Am. B. R. 782.

In Sinsheimer v. Simonson (C. C. A., 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, the circuit court of appeals held that where an assignee in a state court had been paid a fee and had paid his attorney for services rendered in a state proceeding that such sums could not be recovered in a court of bankruptcy by a rule to show cause. Affirmed Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[10] B. A. 1898, Sec. 64; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

[11] *In re* Lacov (C. C. A., 2d Cir.), 142 Fed. Rep. 960, 15 Am. B. R. 290. See also Beach v. Macon Grocery Co., 125 Fed. Rep. 513, 11 Am. B. R. 104.

CHAPTER XI.

PROCEEDINGS PECULIAR TO PARTNERSHIPS.

§ 96. Partnership bankruptcy generally.

The mode of proceeding to have a partnership adjudged to be bankrupt is the same as in the case of an individual debtor.[1] Partners may present a voluntary petition, or a petition may be filed against them by creditors, or a petition may be presented by or against the partners individually as by or against any other person. Where a creditor brings the petition against a firm an act of bankruptcy and a sufficient debt must be alleged and proved, as in the case of an individual. There are, however, some peculiarities connected with the bankruptcy of partnerships which should be noticed and which will be dealt with in this chapter. These peculiarities arise partly from the rights of partners between themselves and partly from the rule which has long prevailed in equity for the distribution of the effects of insolvent partners among their creditors, according to which the joint creditors are entitled to priority of payment out of the joint estate, and the separate creditors of each partner out of his separate estate.[2]

The general scheme of the bankrupt act with reference to the settlement of the estates of firms and the partners is founded upon and its provisions merely declaratory of recognized equitable principles of the administration of insolvent partnerships.[3] By provisions of section 5 of the bankrupt

[1] B. A. 1898, Sec. 5; compare R. S. Sec. 5121.

[2] B. A. 1898, Sec. 5*f* and *g*; *In re* Melick, No. 9399 Fed. Cas., s. c. 4 N. B. R. 97; *In re* Collier, 3002 Fed. Cas., s. c. 12 N. B. R. 266; Harrison v. Sterry, 5 Cranch 289; Collins v. Hood, No. 3015 Fed. Cas., s. c. 4 McLean 186; Murrill v. Neill, 8 How. 414; *Ex parte* Cook, 2 P. Wms. 500; Gray v. Chiswell, 9 Ves. 118; Ridgeway v. Clare, 19 Beav. 111.

[3] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Amsinck v. Bean, 22 Wall. 403, 22 L. Ed. 801; Murray v. Murray, 2 Johns. Chan. 60; Colly. Part. 854.

act, "a partnership," during the continuance of the business, or after its dissolution and before the final settlement of its business, may be adjudged a bankrupt, and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners. The section provides that the creditors of the partnership shall appoint the trustee; that the trustee shall keep separate accounts of the partnership property and of the individual property; that the expenses shall be paid from the partnership property and the individual property in such proportion as the court may determine; and that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and any surplus added to the assets of the individual partners, and the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts, and any surplus to the payment of the partnership debts. It authorizes the partnership estate to prove against the individual estate, and vice versa, and directs the assets of the partnership estate and the individual estates to be marshaled so as to prevent preferences, and secure the equitable distribution of the property of the several estates. It further provides that the property of a partnership shall not be administered in bankruptcy when less than all the members are adjudged bankrupt; and in that event the partner not adjudged bankrupt is to settle the partnership business expeditiously, and account for the interests of the adjudged bankrupt.

§ 96a. Individual petition by or against a partner.

There is nothing in the bankrupt statute to prevent a petition by or against a partner individually and separately without joining the other members of the firm. The statute contains no restrictions upon partners because they are partners with respect to the right to adjudge them bankrupts individually as other persons. The statute recognizes the right

of such a proceeding.[1] It expressly provides that in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.[2] This provision applies to a proceeding by or against one partner or any number less than all, and means that the bankruptcy of one partner shall not preclude the other members from settling the partnership business,[3] unless by the consent of the solvent partners.. This consent may be inferred from the acts of the partners.[4] Such proceedings are simply voluntary or involuntary by or against the individual. The partnership debts and assets are not drawn into bankruptcy to be administered. Only the individual debts and assets, including the interest of the bankrupt partner or partners in the partnership as accounted for by the solvent partners, is administered in bankruptcy. All debts of the partnership having been settled by the solvent partners, a discharge granted the bankrupt partner will release him from all liability for partnership as well as his individual debts.[5]

It has been held that if the petition does not pray that the firm be adjudged bankrupt the co-partners can not come in voluntarily and make themselves parties to the proceedings

[1] B. A. 1898, Secs. 5*c*, 5*h* and 16; *In re* Hirsch, 97 Fed. Rep. 571, 3 Am. B. R. 344; *In re* Mercur (C. C. A., 3d Cir.), 122 Fed. Rep. 384, 10 Am. B. R. 505.

[2] B. A. 1898, Sec. 5*h*; Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801; Moses v. Pond, 4 Am. B. R. 655.

As to the power of a solvent partner to compromise, see *In re* Saul, 5 Fed. Rep. 715.

[3] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976; 3 Am. B. R. 559; *In re* Hirsh, 97 Fed. Rep. 571; 3 Am. B. R. 344; 2 N. B. N. 137.

[4] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976; 3 Am. B. R. 559; *In re* Duguid, 100 Fed. Rep. 274; 3 Am. B. R. 794; 2 N. B. N. 607; *In re* Grant, 106 Fed. Rep. 496; 3 N. B. N. 425.

[5] Jarecki Mfg. Co. v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751.

for the purpose of adjudicating the firm bankrupt.[6] A partnership creditor may join in a petition against one of the partners individually.[7]

Petitions by an insolvent partner of a partnership, which has ceased to do business and has no assets, have attracted considerable attention. How can such a partner proceed to be relieved of his liability for partnership debts as well as individual debts? Two methods of procedure have been adopted under the present act.

An insolvent partner of such a firm has filed his individual petition, scheduled the partnership and his individual debts, averred that the firm has no assets, set forth his property if he had any, and prayed to be adjudged a bankrupt without asking an adjudication against the firm. The prevailing opinion seems to be that in such cases he must at least give notice to his former partners of the proceeding and his desire to be discharged from partnership debts.[8] It has been held that a discharge upon an individual petition releases the debtor from his liability for individual and partnership obligations.[9]

The other and safer course to pursue is to have the partnership and himself adjudicated bankrupts upon a petition by less than all of the partners.[10] In this way the partnership affairs are surely brought into the bankruptcy proceedings and there can be no question but what a discharge will operate as a release of both firm and individual obligations.

[6] Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770; *In re* Boylan, 1757 Fed. Cas., s. c. 1 Ben. 266; *In re* Mercur (C. C. A., 3d Cir.), 122 Fed. Rep. 384, 10 Am. B. R. 505.

[7] *In re* Mercur, 93 Fed. Rep. 634, 2 Am. B. R. 626, s. c. (C. C. A., 3d Cir.), 122 Fed. Rep. 384, 10 Am. B. R. 505.

[8] *In re* Meyers, 96 Fed. Rep. 408, 2 Am. B. R. 707, s. c. 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* McFaun, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Hartman, 96 Fed. Rep. 593, 3 Am. B. R. 65; *In re* Morrison, 127 Fed. Rep. 186, 11 Am. B. R. 498.

[9] Jarecki v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751. See also *In re* Meyer, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111.

[10] For proceedings on such a petition, see Sec. 98, *third post.*

In re Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601.

§ 97. When a partnership may be adjudged a bankrupt.

A partnership which owes debts is entitled to be adjudged a voluntary bankrupt.[1] Any unincorporated company owing debts to the amount of one thousand dollars or over may be adjudged an involuntary bankrupt upon default or impartial trial, and is subject to the provisions and is entitled to the benefits of the statute.[2] In order to maintain proceedings against partnership it is essential to establish a partnership in fact[3] and they must also be alleged and proved to be insolvent,[4] to have committed an act of bankruptcy within four months prior to filing the petition,[5] and to have had their principal place of business within the territorial jurisdiction of the court.[6] In other words, the same things must concur in respect to the partnership as in case of proceedings against an individual.[7]

A partnership is deemed insolvent only when the indebted-

[1] B. A. 1898, Sec. 4*a* and Sec. 1, clause 19.

[2] B. A. 1898, Sec. 4*b*.

[3] Jones v. Burnham Williams & Co. (C. C. A., 3d Cir.), 138 Fed. Rep. 986, 15 Am. B. R. 85; *In re* Beckwith & Co., 130 Fed. Rep. 475, 12 Am. B. R. 453; Lott v. Young (C. C. A., 9th Cir.), 109 Fed. Rep. 798, 6 Am. B. R. 436; *In re* McLaren, 125 Fed. Rep. 835, 11 Am. B. R. 141; Buckingham v. First Nat. Bank (C. C. A., 6th Cir.), 131 Fed. Rep. 192, 12 Am. B. R. 465.

In Burkhart v. German-American Bank, 137 Fed. Rep. 958, 14 Am. B. R. 222, the defense was made that it was a joint stock association under the laws of Ohio, but it was held to be a partnership and was adjudged to be a bankrupt. See also s. c. *sub. nom.* Dickas v. Barnes (C. C. A., 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

In Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763, a corporation *non de jure* was adjudged bankrupt as a partnership.

[4] Vaccaro v. Security Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037; *In re* Perley & Hays, 108 Fed. Rep. 927, 15 Am. B. R. 54; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364; Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763, 3 N. B. N. 131.

[5] B. A. 1898, Sec. 3*b*; *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; Albany Bank v. Johnson, No. 133 Fed. Cas.; 5 L. R. Rep. 313.

[6] B. A. 1898, Sec. 2, clause 1; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364.

[7] For further consideration of this subject, see Sec. 98, *post*.

ness of the firm and partners exceeds the value of the property of the firm together with that of the individual partners.[8]

A partnership may be adjudged bankrupt at any time during the continuation of the partnership business, or after its dissolution and before the final settlement thereof.[9] The language of this provision is simply declaratory of a well-recognized rule that where there are assets or debts of a partnership remaining, the partnership, even after dissolution, may properly be considered as subsisting as to its creditors and for the purpose of applying its joint stock and property to the payment of its creditors.[10]

When a partnership is dissolved by the death of one of the partners the firm can not be adjudged to be bankrupt.[11] The reason for this rule is that a court of bankruptcy has no jurisdiction to adjudge a deceased person to be a bankrupt or to administer his estate. It has, however, been held that a surviving partner may be adjudged to be a voluntary[12] or an involuntary[13] bankrupt, both individually and as surviving partner of the firm. By this method the property of a part-

[8] Vaccaro v. Security Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474; *In re* Perley & Hays, 138 Fed. Rep. 927, 15 Am. B. R. 54; Davis v. Stevens, 104 Fed. Rep. 235, 3 Am. B. R. 131; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588.

But see *In re* McMurtrey & Smith, 142 Fed. Rep. 853, 15 Am. B. R. 427.

[9] B. A. 1898, Sec. 5*a*; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Levy, 95 Fed. Rep. 812, 2 Am. B. R. 21; *In re* Rudnick, 102 Fed. Rep. 750, 2 N. B. N. 975, 4 Am. B. R. 531; *In re* Rosenbaum, 1 N. B. N. 541.

[10] *In re* Crockett, No. 3402 Fed. Cas., s. c. 2 Ben. 514; *In re* Noonan, No. 10292 Fed. Cas., s. c. 3 Biss. 491; *In re* Stowers, No. 13516 Fed. Cas., s. c. 1 Low. 528; *In re* Foster, No. 4962 Fed. Cas., s. c. 3 Ben. 386; *In re* McFarland, No. 8788 Fed. Cas., s. c. 10 N. B. R. 381.

[11] *In re* Temple, No. 13825 Fed. Cas., s. c. 4 Saw. 92; Adams v. Terrell, 4 Fed. Rep. 802; Vaccaro v. Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037.

[12] Briswalter v. Long, 14 Fed. Rep. 153; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979.

[13] *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; Vaccaro v. Security Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037.

nership dissolved by the death of a partner can be drawn into the court of bankruptcy and the administrator has nothing to do with it, except to receive the share of the surplus, if any there be, after settlement of the partnership affairs belonging to the deceased partner.[14] A partnership may be adjudged a bankrupt after the insanity of the partner and the appointment of a conservator of his estate.[15]

The trustee can not take possession of any property of which the administrator has custody without his consent.[16]

Where one of the partners is an infant the adjudication may be made against the firm and the partner who is of age.[17] In such case the petition should be dismissed as to the minor partner without costs and with a specific statement that the dismissal is made by reason of his minority.[17]

Where a partner is exempt from an adjudication because a wage-earner or tiller of the soil or because he has not committed an act of bankruptcy, the firm and such partners as are subject to the law may be declared bankrupts and the property of the firm and *all* of the partners individually may be administered by the court.[18]

§ 98. How to institute proceedings to have a partnership declared bankrupt.

Proceedings to have a partnership declared to be bankrupt may be instituted upon three descriptions of petitions. The proceedings may be begun, *first*, upon the petition of all the partners of the firm; *second*, upon the petition of creditors of the partnership; and, *third*, upon the petition of less than all of the partners.

[14] Briswalter v. Long, 14 Fed. Rep. 153; *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979.

[15] *In re* Stein & Co. (C. C. A., 7th Cir.), 127 Fed. Rep. 547, 11 Am. B. R. 536.

[16] *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489, 2 N. B. N. 979; Moses v. Pond, 4 Am. B. R. 655.

[17] *In re* Dunningan, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

[18] Dickas v. Barnes, Trustee (C. C. A., 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

First. The petition of all the partners is a purely voluntary petition under section 4*a*.[1] Where they all unite in it the jurisdiction must be shown, as that they have had their principal place of business or resided or have had their domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months. It is not necessary to allege an act of bankruptcy to have been committed. The filing of such petition is an act of bankruptcy.[2]

Second. The proceeding upon the petition of creditors of the firm is a purely involuntary proceeding under section 4*b*.[3] Such a petition must specify an act of bankruptcy to have been committed and set forth other requisites of an involuntary petition.

To support an adjudication of bankruptcy against a partnership it seems that formerly there must have been separate acts of bankruptcy by each partner.[4] The present act provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.[5] A partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more (but less than all) of the partners, where such act was within the scope of the partnership business so as to constitute in fact an act of the firm.[6] Where it is sought to have the individual

[1] See Voluntary Proceedings, Chap. IX.

[2] B. A. 1898, Sec. 3*a*, clause 5.

[3] See Involuntary Proceedings, Chap. X.

[4] Allen v. Hartley, 4 Doug. 20; *In re* Redmond, No. 11632 Fed. Cas., s. c. 9 N. B. R. 408, and cases cited in opinion; *In re* Weaver, No. 17307 Fed. Cas., s. c. 9 N. B. R. 132; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150 Fed. Cas., s. c. 3 Biss. 122.

It was held not evidence of an act of bankruptcy by three partners of a banking concern, where one of them resided at the place where the banking house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking house, shut it up and stopped payment. Mills v. Bennett, 2 M. & S. 556, s. c. 2 Rose 269.

[5] B. A. 1898, Sec. 5*c*.

[6] *In re* Meyer (C. C. A., 2d. Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607; *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

partners also declared bankrupts in the same proceeding it is necessary to show that they have committed or been participants in committing one of the enumerated acts.[7] A general assignment by a partnership is an act of bankruptcy by the firm and the partners.[8] The sale by one member of an insolvent firm of his interest to his partner is an act of bankruptcy.[9] If a partnership has committed any one or more of the enumerated acts of bankruptcy it is sufficient to support an adjudication.

To maintain an adjudication against a partnership it must generally be shown to be insolvent. Each partner is liable *in solido* for the debts of the firm so that there are debts of each individual partner. It has accordingly been held that a partnership is not insolvent within the meaning of the bankrupt act while any of the partners are able to pay the firm liabilities.[10] Where a partnership has made a general assignment, which is charged as an act of bankruptcy, it should be adjudged bankrupt irrespective of its solvency.[11]

Third. Proceedings upon petition of less than all the partners to have a firm adjudged bankrupt is a proceeding which necessarily is neither wholly voluntary nor wholly involuntary. So far as the petitioners are concerned, it is voluntary.[12] So far as the partners not petitioning are concerned, it is not involuntary in the sense of section 4*b*, unless the adjudication is asked on the ground of the commission of an act of bankruptcy, although it may be involuntary in the sense of not being voluntary under section 4*a*.[12] Where it is not involun-

[7] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839.

[8] Green River Deposit Bank v. Craig, 110 Fed. Rep. 137, 6 Am. B. R. 381.

[9] *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re* Waite, No. 17044 Fed. Cas., s. c. 1 Low. 207; *In re* Cook, No. 3150 Fed. Cas., s. c. 3 Biss. 122.

[10] Vaccaro v. Security Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 436, 4 Am. B. R. 474, 2 N. B. N. 1037; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; 2 N. B. N. 364, Davis v. Stevens, 104 Fed. Rep. 235, 3 N. B. N. 131, 4 Am. B. R. 763.

[11] West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

[12] *In re* Murray, 96 Fed. Rep. 600, 1 N. B. N. 570, 3 Am. B. R. 601; *In re* Carleton, 115 Fed. Rep. 246; 8 Am. B. R. 270.

tary in the sense of section 4*b* the adjudication may be asked for on the ground that the members of the partnership are unable to pay all their debts in full. Form No. 2, prescribed by the supreme court, is a petition of this character.

Any member of a partnership who refuses to join in a petition to have the partnership declared bankrupt is entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership. Notice of the filing of the petition must be given to him in the same manner as provided by law and by the rules in the case of a debtor petitioned against.[13] He has the right to appear at the time fixed by the court for the hearing of the petition and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act.[14]

In any proceeding to have a partnership declared bankrupt all of the partners should be named in the petition and brought before the court.[15] One who holds himself out as a partner,

[13] Gen. Ord. 8; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Altman, 95 Fed. Rep. 263, 2 Am. B. R. 407; *In re* Moore, No. 9750 Fed. Cas., s. c. 5 Biss. 79; *In re* Prankard, No. 11136 Fed. Cas., s. c. 1 N. B. R. 297; *In re* Lewis, No. 8311 Fed. Cas., s. c. 2 Ben. 96.

For form of notice when service is made by publication, see *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601.

[14] Gen. Ord. 8; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Fowler, No. 4998 Fed. Cas., s. c. 1 Low. 161.

In re Forbes, 128 Fed. Rep. 137, 11 Am. B. R. 787, Judge Lowell held "that a non-assenting partner can not set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the firm is adjudged bankrupt, the adjudication must be several as well as joint. The non-assenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

[15] *In re* Moore, No. 9750 Fed. Cas., s. c. 5 Biss. 79; *In re* Lewis, No. 8311 Fed. Cas., s. c. 2 Ben. 96; *In re* Prankard, No. 11366 Fed. Cas., s. c. 1 N. B. R. 297; Gen. Ord. 8; *In re* Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; Dickas v. Barnes, trustee (C. C. A., 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

although he has actually retired from the firm, may be made a bankrupt as a member of the firm upon a creditor's petition.[16] It is not necessary, however, to name or serve a secret or dormant partner in order to have a valid adjudication in bankruptcy.[17] If the name of such partner is known, he should be made a party to the proceedings.

The petition to have a partnership adjudged to be bankrupt may be filed in the district where the firm has had its principal place of business for the greater portion of the six months preceding the filing of the petition.[18] It may be filed in any district in which a court of bankruptcy has jurisdiction of one of the partners.[19] If the court has jurisdiction of one of the partners of a firm it may have jurisdiction of all the partners and of the administration of the partnership and of the individual property.[19] In case two or more petitions are filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction takes and retains jurisdiction over all proceedings in such bankruptcy until the same are closed.[20] If such petitions are filed in the same district, action is first had upon the one first filed. But the court so retaining jurisdiction may, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.[21]

Where a petition is filed by partners, whether all or a part only join, the petition must be in the prescribed form.[22] It

[16] *In re* Krueger, No. 7941 Fed. Cas., s. c. 2 Low. 66.

[17] Metcalf v. Officer, No. 9496 Fed. Cas., s. c. 5 Dill. 565; *In re* Harris, 4 Am. B. R. 132, 108 Fed. Rep. 517.

[18] B. A. 1898, Sec. 2, clause 1.

[19] B. A. 1898, Sec. 5*c*; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588, 2 N. B. N. 364; *In re* Murray, 96 Fed. Rep. 600, 1 N. B. N. 570, 3 Am. N. B. R. 601.

In re Strauss & Stern, a partnership, S. D. O. (not reported), it was ruled under this clause that the court had jurisdiction of the partnership by virtue of Stern's residing within the district. Strauss was a non-resident of the district and the firm had no place of business.

[20] Gen. Ord. 6.

[21] B. A. 1898, Sec. 32; Gen. Ord. 6. See Sec. 84, *ante*.

[22] Official Form No. 2, Form No. 4, *post*.

must be accompanied by a separate schedule of the liabilities and assets of the partnership and by separate schedules of the individual liabilities and assets of each petitioning partner.[23] These schedules are prepared in the manner required in a case of voluntary bankruptcy.[24] If any partner refuse to join in the petition to have the partnership declared bankrupt and an adjudication is made, such partner must file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.[25] In the case of a petition filed by creditors the schedules are prepared as in involuntary proceedings.

It is not necessary to file a petition by or against all the partners and also a separate petition against each in order to administer the joint and separate estates of the firm and the several partners.[26] A petition by or against a partnership is one proceeding. Only one deposit for costs need be made.[26] In such cases the prayer of the petition should be that the "firm and the partners individually" be adjudged bankrupts. Otherwise the firm only is adjudged bankrupts.[27] The statute expressly authorizes the court of bankruptcy which has jurisdiction of one of the partners to administer the partnership and individual property.[28]

A creditor will not be permitted ordinarily to intervene to oppose an adjudication of a partnership upon petition of a partner.[29]

[23] *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Brick, 4 Fed. Rep. 804; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511.

[24] Official Form No. 1, Schedules A and B; see Forms Nos. 2 and 3, *post*.

[25] Gen. Ord. 8.

[26] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Langslow, 98 Fed. Rep. 869, 1 N. B. N. 232, 3 Am. B. R. 529*n*; but see *In re* Barden, 101 Fed. Rep. 553, 2 N. B. N. 741, 4 Am. B. R. 31; *In re* Farley, 115 Fed. Rep. 359, 8 Am. B. R. 266.

[27] Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

[28] B. A. 1898, Sec. 5*c*; Diekas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

[29] *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

§ 98a. The adjudication and reference in partnership cases.

The proceedings leading up to an adjudication and reference in partnership cases are the same as in other voluntary or involuntary proceedings according as the petition seeking an adjudication is voluntary or involuntary.[1]

When a petition on behalf of a part of the members of a firm is filed in the clerk's office, it can not then be classed as an involuntary proceeding, because it may never become such, and, in the absence of the judge from the district or division, it is the duty of the clerk to refer the case to the proper referee. The case, however, whether coming before the judge or a referee, can not be properly proceeded with until notice of the pendency of the proceeding has been given to the member or members of the firm who have not joined in the petition as filed, and, under the provisions of general order No. 8, a time must be fixed for a hearing upon the petition, of which due notice must be given.

If the non-joining member or members of the firm can be found, in the district or out of it, personal service of the notice must be made; but, if personal service can not be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice can not be made, an order of publication of notice will be made, as provided for in section 18 of the act, which enacts that notice by publication shall be given in the same manner, and for the same time, as in cases in equity in courts of the United States, which are governed by the provisions of section 8 of the judiciary act of March 3, 1875,[2] which requires the court to make an order requiring the named party to appear and plead to the petition by a named day, and to direct the publication of such order, if personal service thereof can not be made, in such manner as the court may direct, not less than once a week for six consecutive weeks. If, upon the hearing thus provided for, the nonpetitioning

[1] *In re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 601, 1 N. B. N. 570.

[2] 18 Stat. at L. 472.

member or members of the firm join with their copartners in the prayer of the petition, or, by failing to enter an appearance, show that they do not propose to contest the adjudication, then the referee will enter the adjudication, and the case will be proceeded with as in other voluntary proceedings.

If the nonpetitioning members of the firm should appear at the hearing, and, by proper pleading, should make defense to the proceedings as provided for in general order No. 8, then the referee must certify the case to the judge, before whom the issue will be heard, a jury trial being had if the party has demanded the same under the provisions of section 19 of the act; that is, by filing with the referee a written demand for a jury at or before the time fixed for the hearing before him.

Where a proper case is made by the petition and proofs the firm and the individual partners are regularly adjudicated bankrupt in one proceeding. As the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual partners can not be adjudged bankrupts in such a proceeding, who have not committed, or been participants in committing one or more of the enumerated acts.[3] This draws into the court of bankruptcy the estates and debts of the partnership and the individual estates and debts of the several partners to be administered.[4] The firm and the individual partners may thereupon be discharged from both firms and individual debts.[5]

A partnership may be adjudged a bankrupt in a voluntary or involuntary proceeding, without an adjudication against any or some of the partners individually.[6] Such a proceeding may draw to the administration the individual estates of the

[3] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re* Hale, 6 Am. B. R. 35, 107 Fed. Rep. 432.

[4] *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re* Langslow, 98 Fed. Rep. 869, 1 N. B. N. 232. See aso *In re* Barden, 101 Fed. Rep. 553, 4 Am. B. R. 31; *In re* Farley, 115 Fed. Rep. 359, 8 Am. B. R. 266.

[5] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re* Hale, 6 Am. B. R. 35, 107 Fed. Rep. 432.

partners as well as the partnership assets, and marshal and distribute them according to equity.[6] The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupts. If there is an adjudication of any of the partners there is nothing to prevent such partners from receiving a discharge individually, if they are otherwise entitled to it under the act.[7] The partners are not entitled to a discharge individually if they are not adjudicated bankrupts.[8]

§ 99. The administration of partnership estates.

The trustee in proceedings to have a firm declared bankrupt is appointed by the creditors of the partnership, as distinguished from the creditors of the individual partners.[1] The trustee administers both the partnership property and the property belonging to the individual partners. The trustee administers the property of the individual partners even when such partners are and can not be adjudged bankrupts.[2] He is required to keep separate accounts of such properties.[3] The expenses are paid from the partnership property and the individual property in such proportions as the court may determine.[4]

When a person not in partnership with another is adjudged a bankrupt the whole of his property becomes divisible among

[6] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

In re Dickas v. Barnes (C. C. A., 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566, some of the partners were wage earners and farmers and not subject to be adjudicated bankrupts in an involuntary proceeding, but their estates were administered in the bankruptcy proceedings against the partnership.

[7] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Amelia Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111.

[8] Strause v. Hopper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276.

[1] B. A. 1898, Sec. 5*b*; *In re* Eagles & Crisp, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[2] Dickas v. Barnes, Trustee (C. C. A., 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566.

[3] B. A. 1898, Sec. 5*d*.

[4] B. A. 1898, Sec. 5*e*.

all his creditors ratably. A different mode of distribution prevails as to bankrupt partners.

The statute enacts that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership. The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." [5]

This is substantially the rule stated at an early date by Lord Chancellor King in *ex parte* Cooke,[6] and subsequently confirmed by Lord Eldon [7] and others. It has been the subject of enactment in the English bankruptcy act of 1883,[8] and in the former bankruptcy laws of the United States.[9]

Where several persons are members of different firms and a joint adjudication is obtained against all of them, distinct accounts will be had of the estates of the respective firms as well as of the separate estate of each bankrupt, and each estate will be made to bear its own debts and its fair proportion of the expenses.[10] Where the same partners conduct business in

[5] B. A. 1898, Sec. 5*f* and *g*; *In re* Blumer, 12 Fed. Rep. 489; *In re* Bates, 100 Fed. Rep. 263, 4 Am. B. R. 56.

[6] 2 P. W. 500.

[7] *Ex parte* Clay, 6 Ves. 813*a*; *Ex parte* Taitt, 16 Ves. 193.

[8] Sec. 40, Subsec. 3, of the act of 1883, Eng. Bank. Rule, No. 293.

[9] R. S. Sec. 5121; the act of 1841, 5 Stat. at L., Sec. 14, p. 448.

[10] *In re* Hinds, No. 6516 Fed. Cas., s. c. 3 N. B. R. 351; *In re* Dunkerson, No. 4156 Fed. Cas., s. c. 4 Biss. 227; *In re* Ellis, No. 4399 Fed. Cas., s. c. 5 Ben. 421; *Ex parte* Marlin, 2 Bro. C. C. 15; *In re* Stanton, No. 13295 Fed. Cas., 28 Miss. 447.

two different places under different names, the two firms will be treated as one firm in the distribution of the assets, and no notice will be taken of the indebtedness of one firm to the other.[11] Where one partner has sold out to his copartner before bankruptcy, the property belonging to the firm at the time of the dissolution should be applied first to the payment of the firm creditors, the separate estate of the purchasing partner should be applied first to the payment of his separate debts, and any surplus in either fund should then be applied on the other.[12]

The general rule prescribed by the statute applies only when there are two funds to be administered—a joint fund and an individual fund. Where there are no "net proceeds" of the partnership estate for distribution the firm and individual creditors may share *pari passu* in the individual estate.[13] It has been held that this exception to the general rule does not apply under the present bankrupt act because it is not mentioned in the statute.[14] But when Congress adopts a rule of

[11] *In re* Vetterlein, No. 16927 Fed. Cas., s. c. 5 Ben. 311; Buckner v. Calcote, 28 Miss. 432, and note on page 447; *In re* Lloyd, 22 Fed. Rep. 90; Ballin v. Ferst, 55 Ga. 546; *In re* Williams, No. 17707 Fed. Cas., s. c. 3 Woods 493; *In re* Savage, No. 12381 Fed. Cas., s. c. 16 N. B. R. 368; *In re* Vetterlein, 44 Fed. Rep. 57.

[12] *In re* Denning, 114 Fed. Rep. 219, 8 Am. B. R. 133.

[13] Conrader v. Cohen (C. C. A., 3d Cir.), 121 Fed. Rep. 801, 9 Am. B. R. 619, affirming *In re* Conrader, 118 Fed. Rep. 676, 9 Am. B. R. 85; *In re* Green, 116 Fed. Rep. 118, 8 Am. B. R. 553; *In re* West, 39 Fed. Rep. 203; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Jewett, No. 7304 Fed. Cas., s. c. 1 N. B. R. 491; *In re* Rice, No. 11750 Fed. Cas., s. c. 9 N. B. R. 373; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; *In re* Mills, No. 9611 Fed. Cas., s. c. 11 N. B. R. 74; *In re* Knight, No. 7880 Fed. Cas., s. c. 2 Biss. 518.

[14] *In re* Janes (C. C. A., 2d Cir.), 133 Fed. Rep. 912, 13 Am. B. R. 341; *In re* Henderson, 142 Fed. Rep. 588, 16 Am. B. R. 91.

In re Wilcox, 94 Fed. Rep. 84, 2 Am. B. R. 117, Judge Lowell has reviewed the history of the practice in this country and in England in an elaborate opinion and held that this exception to the general rule did not apply under the present bankrupt act. The large number of cases reviewed by him shows, however, that this exception has generally been recognized both in equity and bankruptcy from very early times.

administering partnership property which has received a uniform construction in the courts of equity and bankruptcy from very early times, it is presumed that it intends the same construction placed on its language, unless it expressly declares otherwise. Any partnership assets, however small, which are available for distribution will defeat the right of firm creditors to receive dividends from the separate estate until after the individual debts are paid.[15] Where the firm assets are only sufficient to pay the expenses of the proceedings, the firm creditors may share in the individual estate, for the words "net proceeds" refer to the estate to be distributed among the creditors.[16] The weight of authority is to the effect that in order to exclude the firm creditors, an available joint fund must be affirmatively shown to exist. The burden of proving that there is such a fund rests upon the individual creditors.[17] Where there are no individual assets the separate creditors of the partners can not prove against the partnership fund,[18] except in the surplus after paying the firm debts.

It seems that the general rule may be waived by the partnership, as by giving a mortgage upon partnership property to secure an individual debt.[19]

In re Mills, 95 Fed. Rep. 269, 2 Am. B. R. 667, Judge Baker refused to permit partnership creditors, who had received fifty-five percentum of their claims in a state proceeding, closing up a partnership, to prove the residue of their claims equally with the individual creditors in the distribution of the individual estate. There were no firm assets.

[15] *In re* Marwick, No. 9181 Fed. Cas., s. c. 2 Ware 233; *In re* Smith, No. 12987 Fed. Cas., s. c. 13 N. B. R. 500; *In re* Morse, No. 9854 Fed. Cas., s. c. 13 N. B. R. 376; *In re* Blumer, 12 Fed. Rep. 489; *In re* Litchfield, 5 Fed. Rep. 47.

[16] *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Litchfield, 5 Fed. Rep. 47.

[17] *In re* Jewett, No. 7304 Fed. Cas., s. c. 1 N. B. R. 491; *In re* West, 39 Red. Rep. 203; *contra In re* Byrne, No. 2270 Fed. Cas., s. c. 1 N. B. R. 464.

[18] *In re* Kinkead, No. 7825 Fed. Cas., s. c. 3 Biss. 405.

[19] *In re* Kahley, No. 7593 Fed. Cas., s. c. 2 Biss. 383; Thompson v. Spittle, 102 Mass. 207.

See also Fisher v. Syfers, 109 Ind. 514; Nat. Bank v. Sprague, 20 N. J. Eq. 13; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.) 494; Purple v. Farrington, 119 Ind. 164, Winslow v. Wallace, 116 Ind. 317, Jones Chat. Mort., Sec. 44.

In view of the general rule of distribution prescribed by the statute, it is important to ascertain, *first,* what property is to be treated as belonging to the firm and what property as belonging to the individual partners; and, *second,* what debts are properly firm debts and what are properly individual debts. These matters will be discussed in the next two sections.

§ 100. What is firm and individual property respectively.

It may be stated generally that the partnership property consists of all the property which forms the stock of the firm, and all debts owing to the partnership, and all of the real or personal property purchased with the firm money.[1] The presumption that it belongs to the firm will arise when real estate is purchased with firm money, although the conveyance is made to one partner alone, who in such case is considered a trustee for the firm;[2] so also when stock in a corporation is purchased with firm money and transferred in the name of one of the partners he will be deemed the trustee for the firm.[3] But where property is bought with firm money and taken in the name of one partner under an agreement that it shall be his separate property, it will be regarded as a loan to him from the partnership of the partnership money.[4] Property acquired by a surviving partner by means of his position as partner is deemed firm property.[5]

Premises used by persons for the purpose of carrying on

[1] Hiscocks v. Jaycox, No. 6531 Fed. Cas., s. c. 12 N. B. R. 507; Marrett v. Murphy, No. 9103 Fed. Cas., s. c. 11 N. B. R. 131; Thrall v. Crampton, No. 14008 Fed. Cas., s. c. 9 Ben. 218; Buchan v. Sumner, 2 Barb. Ch. 165, and approved in Collumb v. Read, 24 N. Y. 505; Fereday v. Wightwick, 1 R. & M. 49.

But not so when the deed to real estate is taken to themselves jointly as tenants in common. Jones' Appeal, 70 Penn. 169.

[2] Smith v. Smith, 5 Ves. 193; *Ex parte* Hinds, 3 De G. & S. 613; *In re* Groetzinger, 127 Fed. Rep. 814, 11 Am. B. R. 723.

[3] *Ex parte* Connell, Deac. 201, s. c. 3 M. & A. 581.

[4] Smith v. Smith, 5 Ves. 193; Taylor v. Rasch, No. 13801 Fed. Cas., s. c. 5 N. B. R. 399.

[5] Featherstonhaugh v. Fenwick, 17 Ves. 308; Clements v. Hall, 2 De G. & J. 172.

their trade are *prima facie* a part of the partnership property, but this presumption may be rebutted.[6]

A sale by one partner to his copartner, when the firm is insolvent, which if held would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is considered fraudulent. Such a sale will be set aside and the property distributed as firm property.[7] But it is competent for solvent partners to make any arrangements which they think proper with respect to their joint property in the partnership, or the separate property of the partners, and to alter the character of the property so as to convert joint into separate property and *vice versa*. Such agreement, if made *bona fide*, will bind their creditors, and in the event of bankruptcy the property will be administered as firm or separate property, according to the character which the partners have placed upon it.[8] Where one partner sold his interest to another, with an agreement that the continuing partner should collect the firm assets and pay the firm debts, and he carried on the business and from time to time replenished the stock of goods, mingling the old and new together and sold from either indifferently so that it was impossible to tell which were the goods of the old firm and which were the goods of the continuing partner alone, it was held upon the bankruptcy of both partners of the old firm that the assets in the hands of the continuing partner were to be regarded as individual assets, to be applied to the payment of his individual debts before any portion could be used to pay the debts of the old firm.[9]

[6] Osborn v. McBride, No. 10593 Fed. Cas., s. c. 3 Saw. 590; Featherstonhaugh v. Fenwick, 17 Ves. 308.

[7] *In re* Cooke, No. 3150 Fed. Cas., s. c. 3 Biss. 122; Collins v. Hood, No. 3015 Fed. Cas., s. c. 4 McLean 186; *In re* Byrne, No. 2270 Fed. Cas., s. c. 1 N. B. R. 464; Mattocks v. Rogers, 1 Hask. 547; *In re* Zug, No. 18222 Fed. Cas., s. c. 16 N. B. R. 280.

[8] *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141; *In re* Montgomery, No. 9727 Fed. Cas., s. c. 3 Ben. 565; *In re* Willey, No. 17656 Fed. Cas., s. c. 4 Biss. 214; *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Kahley, No. 7593 Fed. Cas., s. c. 2 Biss. 383.

[9] *In re* Montgomery, No. 9727 Fed. Cas., s. c. 3 Ben. 565.

The assets of an individual partner consist of that property in which such partner is separately interested at the time of the bankruptcy.[10] Where all the property of the firm belongs to one partner and the others having no interest in the gains and profits, such property is the individual property of the partner. Where the interest of each partner extends to the entire stock in trade, the excess of the interest of one partner over that of the other partners is not the former's separate estate.[11]

§ 101. What are firm and individual debts respectively.

Having regard to the rule prescribed by the statute for the administration of the estates of firms and partners, their debts may be divided into three classes, namely, *first,* joint or firm debts, that is, debts for which the partners are jointly liable; *second,* individual debts, that is, debts for which they are separately liable; and, *thirdly*, joint and separate debts, or debts for which the partners are separately as well as jointly liable.

First: Firm Debts.—A debt is considered a firm debt and may be proved against the joint or partnership fund when it is contracted or incurred by the partnership in the ordinary course of business. It is clearly so when all the partners act jointly. Thus it has been held to be joint debt where a joint and several note was given for money borrowed by a firm and signed in the firm name, with other names following,[1] or where a note was endorsed in the name of the firm.[2] Trust

[10] *In re* Lowe, No. 8564 Fed. Cas., s. c. 11 N. B. R. 221; *In re* Clark, No. 2798 Fed. Cas., s. c. 4 Ben. 88. *In re* Rudnick, 102 Fed. Rep. 750, 4 Am. B. R. 531, 2 N. B. R. 975, it was held that where one partner had, prior to bankruptcy, transferred all of his property and interests to the other partner, and it became in the hands of the other partner, who was also a bankrupt debtor, exempt under the laws of the state, he may lawfully sell or dispose of it, and the trustee takes no title therein. But see *In re* Rosenbaum, 1 N. B. N. 541.

[11] *In re* Lowe, No. 8564 Fed. Cas., s. c. 11 N. B. R. 221.

[1] *In re* Holbrook, No. 6588 Fed. Cas., s. c. 2 Low. 259; Bush v. Crawford, No. 2224 Fed. Cas., s. c. 7 N. B. R. 299. See McDaniel v. Stroud (C. C. A., 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

[2] Gauss v. Schrader, 48 Fed. Rep. 816; *In re* Norris, No. 10302 Fed. Cas., s. c. 2 Hask. 19; *In re* Morse, No. 9853 Fed. Cas., s. c. 11 N. B. R.

funds which have been invested by an executor in his partnership business with the knowledge and consent of his copartner may be proved against the partnership fund.[3] A judgment against partners and others jointly is a several claim as against the partners, and can not receive a dividend from the joint estate,[4] but a judgment on a firm note for a firm debt is provable against the firm.[5] A claim on a bond or notes signed by individual partners, but not for a firm obligation, is not entitled as against the firm creditors to be paid from the partnership assets.[6] When a note or bond is given for a firm debt the rule is otherwise.[7] A note given by a firm and endorsed by one partner is a firm debt.[8]

A debt is not always so manifestly a firm debt when it is contracted by one of the partners for the firm. In determining whether such a debt is a firm debt or an individual debt resort must be had to the general law of partnership.[9] The general rule is that every partner is the general agent of the firm to carry out its objects and transact its business in the usual and ordinary way; that he is not the agent of each partner individually and can not bind them severally or any number of them less than all. Unless his power is limited by the articles and the restriction is known, he represents all the powers of the firm within the scope of its ordinary business, but is confined to such acts as are necessary for carrying on the partnership business in the ordinary way, according to

482; *Ex parte* Russell, No. 12148 Fed. Cas., s. c. 16 N. B. R. 476. But see *In re* Jones, 100 Fed. Rep. 781, 4 Am. B. R. 141, 2 N. B. N. 193.

[3] *In re* Tesson, No. 13844 Fed. Cas., s. c. 9 N. B. R. 378.

[4] *In re* Herrick, No. 6420 Fed. Cas., s. c. 13 N. B. R. 312; *In re* Lewis, No. 8313 Fed. Cas., s. c. 8 N. B. R. 546.

[5] *In re* Berriam, No. 1351 Fed. Cas., s. c. 6 Ben. 297; *In re* Kitzinger, No. 7861 Fed. Cas., s. c. 19 N. B. R. 152.

[6] *In re* Webb, No. 17313 Fed. Cas., s. c. 2 N. B. R. 614; *In re* Roddin, No. 11989 Fed. Cas., s. c. 6 Biss. 377; *In re* Miller, No. 9556 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 180; *In re* Bucyrus Machine Co., No. 2100 Fed. Cas., s. c. 5 N. B. R. 303; Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276.

[7] *In re* Warren, No. 17191, Fed Cas., s. c. 2 Ware 322.

[8] Lamoille County Nat. Bank v. Stevens, 107 Fed. Rep. 245, 6 Am. B. R. 164.

the usages of the particular business. The several instances in which a partner may contract a debt for the firm will be found in the works on partnership and need not be considered here.[9]

Second: Individual Debts.—Individual debts are such as are contracted by the individual partners for their own benefit or such liabilities as by law they are required to liquidate. Debts for individual clothing, furniture and the like are individual and not partnership debts.[10] Creditors holding individual obligations of the members of the firm, although given for a consideration moving to the firm, are entitled to a dividend out of the individual estates.[11] A solvent partner who has paid firm debts out of his separate estate is entitled to prove contribution against the separate estate of his bankrupt partners.[12] An administrator of a deceased partner, whose property has been converted by the surviving partner, has a provable claim against the separate estate of the surviving partner.[13] A firm may prove against the separate estate of a partner for moneys withdrawn by the latter from the firm.[14] A firm debt may be proved in proceedings instituted by a single partner on an individual petition.[15] The reason for

[9] See Bates on Partnership, Sec. 315, *et seq.;* Lindley on Partnership, p. 124; Taylor v. Rasch, No. 13800 Fed. Cas., s. c. 1 Flip. 385.

[10] Taylor v. Rasch, No. 13800 Fed. Cas., s. c. 1 Flip. 385.

[11] *In re* Lehigh Lumber Co., 101 Fed. Rep. 216, 4 Am. B. R. 221, 2 N. B. N. 512; *In re* Stevens, 104 Fed. Rep. 323, 5 Am. B. R. 9; *In re* Jones, 116 Fed. Rep. 341, 8 Am. B. R. 626; *In re* Bucyrus Machine Co., No. 2100 Fed. Cas., s. c. 5 N. B. R. 303; *In re* Miller, No. 9556 Fed. Cas., s. c. 1 N. Y. Leg. Obs. 180.

[12] *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Swift, 106 Fed. Rep. 65, 5 Am. B. R. 415; *In re* Dell, No. 3774 Fed. Cas., s. c. 5 Saw. 344. See *In re* Hamilton, 1 Fed. Rep. 800, where two firms were partners, and one firm tried to prove against the individual estate of a member of the other firm.

[13] *In re* Mills, No. 9611 Fed. Cas., s. c. 11 N. B. R. 74.

[14] *In re* May, No. 9328 Fed. Cas., s. c. 19 N. B. R. 101; *In re* McLean, No. 8879 Fed. Cas., s. c. 15 N. B. R. 333; B. A. 1898, Sec. 5g.

See *In re* Lane, No. 8044 Fed. Cas., s. c. 2 Low. 333; *In re* McEwen, No. 8783 Fed. Cas., s. c. 6 Biss. 294; *In re* Smith, No. 12991 Fed. Cas., s. c. 16 N. B. R. 113.

[15] *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326; Wilkins v.

this is, that each partner is liable for the debts of the firm and is released from such liability by his discharge.[16]

THIRD: JOINT AND SEPARATE DEBTS.—There are some debts of such a character that they may be proved both against the firm and the individual. In such cases where a dividend has been paid on one estate, the amount should be deducted and a dividend only on the balance allowed from the other. But when the dividends on both estates are simultaneous the creditor is entitled to prove against both estates for the whole debt. In no case is he entitled to collect more than the amount of his debt from both estates.

Thus, a note made by a firm and endorsed by one of the partners individually may be proven, both against the estate of the firm and the individual estate of the endorser.[17] So also the beneficiaries of a trust fund, invested by the executor in his partnership business with the knowledge and consent of his copartner, may prove their claim against the partnership, although they have proved it against the estate of the executor.[18] Where a member of a firm which is general agent of a corporation misappropriated funds to the uses of the firm, which was known by the firm, it was held that proof might be made both against the firm and the individual estate.[19] Where a creditor holds different notes for partnership debts, some made by the individual partners and others in the name of the firm, he may prove the individual notes against the individual estates and the firm notes against the firm estates.[20]

Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Frear, No. 5074 Fed. Cas., s. c. 2 Ben. 467.

[16] See Effect of Discharge, Sec. 102, *post.*

[17] Buckingham v. First Nat. Bank (C. C. A., 6th Cir.), 131 Fed. Rep. 192, 12 Am. B. R. 465; *In re* Farnum, No. 4674 Fed. Cas., s. c. 6 Law Rep. 21; Emery v. Canal Nat. Bank, No. 446 Fed. Cas., s. c. 3 Cliff. 507; Stephenson v. Jackson, No. 13374 Fed. Cas., s. c. 2 Hughes 204; *In re* Bradley, No. 1772, Fed. Cas., s. c. 2 Biss. 515; Mead v. National Bank, No. 9366, Fed. Cas., s. c. 6 Blatch. 180; *In re* Knight, No. 7880 Fed. Cas., s. c. 2 Biss. 518; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141; *In re* Adams, 29 Fed. Rep. 843.

[18] *In re* Tesson, No. 13844 Fed. Cas., s. c. 9 N. B. R. 378.

[19] *In re* Baxter, No. 119 Fed. Cas., s. c. 18 N. B. R. 62.

[20] Mead v. National Bank, No. 9366 Fed. Cas., s. c. 6 Blatch. 180.

Where a creditor of a partnership has a lien on both the partnership and individual assets of the members, he may resort to either fund for payment at his option, unless there are creditors having liens only on the individual fund. Then the equitable rule as to two funds will apply and the partnership creditor must first exhaust the partnership fund.[21] A partnership creditor who is secured by a pledge or mortgage upon the individual property of a partner may ordinarily prove for his whole claim against the partnership without first exhausting his security.[22]

Another class of joint and separate debts arises upon the conversion of joint into separate debts and *vice versa*. Thus, when one of the partners takes the firm assets and agrees to pay the joint debt he becomes individually liable,[23] and the retiring partner will also continue liable as before the dissolution of the partnership.[24] The retiring partner may be released from such liability if the creditors agree to accept the continuing partner as their sole debtor. Precisely what amounts to such an acceptance it is impossible to state. It seems that mere dealing by the creditor with the continuing partner as his debtor, or the taking of a separate security from him not involving a merger of the original debt, is not conclusive evidence of an intention to abandon all claims against the retiring partner.[25] In order that the transaction should have this effect it must be shown that the security was intended to

[21] *In re* Lewis, No. 8313 Fed. Cas., s. c. 2 Hughes 320.

[22] *In re* May, No. 9327 Fed. Cas., s. c. 17 N. B. R. 192. See also *In re* Norris, No. 10302 Fed. Cas., s. c. 2 Hask. 19.

[23] *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed. Cas., s. c. 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141.

[24] *In re* Pease, No. 10881 Fed. Cas., s. c. 13 N. B. R. 168; Dickenson v. Lockyer, 4 Ves. 36; Smith v. Jameson, 5 T. R. 601; Graham v. Whichelo, 1 Cr. & M. 186.

[25] Harris v. Farwell, 15 Beav. 31; David v. Ellice, 5 B. & C. 196; *Ex parte* Smith, 1 M. D. & D. 165; Heath v. Percival, 1 P. W. 682; Lodge v. Dicas, 3 B. & A. 611.

be taken in satisfaction of the original debt, or that a new was substituted for the old liability.[26]

In case there is no such acceptance the firm creditors may prove against the estate of the continuing partner and share *pari passu* with the separate creditors.[27] They may then pursue the individual partner for the balance.[28]

It may happen upon the formation of a partnership between two persons that it is agreed that the debts of one of them shall become the joint debts of the firm. Such an agreement will not make his separate creditors joint creditors of both partners unless the creditors assent to the arrangement. If the partnership is adjudged bankrupt before such assent is given, such creditors will not be entitled to prove their claims as joint creditors of the firm against the partnership estate.[29]

The character of a debt may be changed from joint to separate or *vice versa* by taking security of a higher nature or by obtaining a judgment. The theory upon which this rule rests is that the original debt is extinguished or merged, and the right to prove depends upon the nature of the substituted security whether it is joint or separate. Thus, a simple contract debt will merge in a bond and a bond in a judgment,[30] but a

[26] See cases cited in last note above, and Bilborough v. Holmes, 5 Chan. Div. 255; *Ex parte* Butcher, 13 Chan. Div. 465.

[27] *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed Cas., s.c. 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., s. c. 7 Ben. 141.

[28] *In re* Pease, No. 10881 Fed. Cas., s. c. 13 N. B. R. 168.

[29] *In re* Isaacs, No. 7093 Fed. Cas., s. c. 3 Saw. 35; Hibberd v. McGill (C. C. A., 3d Cir.), 129 Fed. Rep. 590, 12 Am. B. R. 101.

In First Nat. Bank v. State Nat. Bank (C. C. A., 9th Cir.), 131 Fed. Rep. 422, 12 Am. B. R. 429 and 440, affirming *In re* McIntire, 132 Fed. Rep. 295, 12 Am. B. R. 787, it was held that where there is no sufficient evidence to sustain a finding that a partnership assumed the indebtedness of an old firm at the formation of the new partnership, the notes of the new firm signed by the partner of the old firm as renewal notes of such indebtedness to bank which had knowledge of the fact, are not provable against the new firm's estate in bankruptcy.

[30] Higgens's Case, 6 Coke 344; *Ex parte* Christy, 2 Dea. & Chit. 155; Price v. Moulton, 10 C. B. 561; *Ex parte* Davy Ridg. 289.

simple contract debt will not merge in a bill of exchange or a promissory note, for the quality is not changed.[31]

§ 102. The effect of a discharge.

Proceedings to obtain a discharge and in opposition thereto in cases in which partners are adjudged bankrupts are the same as in other cases.[1] It is, however, important to consider the effect of a discharge of bankrupt partners. Where the firm and some or all of the partners are declared bankrupts the discharge of a partner releases him from his individual and the partnership debts which are provable in bankruptcy.[2]

The effect of a discharge of a partner upon an individual petition and without any proceedings by or against the firm is not so clear. The authorities are conflicting upon this point. It has been held that where an individual member of a partnership files his petition in bankruptcy and obtains a discharge, that such discharge releases him from his individual debts and also from his partnership obligations.[3] This is also the rule in England.[4] But it has been held that such a discharge does not release him from partnership obligations.[5]

"The cases holding that a discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the prin-

[31] *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Seddon, 2 Cox 49.

[1] See Discharges, Chap. XXVI.

[2] *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Gay, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re* Amelia Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168.

[3] Jarecki Mfg. Co. v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; *In re* Abbe, No. 4 Fed. Cas., s. c. 2 N. B. R. 75; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168; *In re* Brick, 4 Fed. Rep. 805-6; *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326.

[4] *Ex parte* Yale, 3 P. W. 25, note a; *Ex parte* Hammond, 21 Wkly. Rep. 865; Thomson v. Harding, 3 C. B. (N. S.) 254.

[5] Hudgins v. Lane, No. 6827, Fed. Cas., s. c. 2 Hughes 361; *In re* Noonan, No. 10292 Fed. Cas., s. c. 10 N. B. R. 330; *In re* Little, No. 8390 Fed. Cas., s. c. 2 Ben. 186; *In re* Grady, No. 5654 Fed. Cas., s. c. 3 N. B. R. 227; *In re* Bidwell, No. 1392 Fed. Cas., s. c. 2 N. B. R. 229.

ciple that the trustee could not acquire possession of and administer the assets of the firm. In so holding it seems to have been overlooked that the bankruptcy of one member is *ipso facto* a dissolution of the firm, and that, while the solvent partner would be allowed to adminster the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets after the payment of the partnership debts. The separate estate of the bankrupt partner, and his beneficial interest in the firm after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner." [6]

Where an individual petition is filed by a partner of a firm without assets, the prevailing opinion at present is, that, if objection is made pending the bankruptcy proceeding, on the ground that the other partner has not been made a party, the court should order that to be done and upon failing to comply with such order, to dismiss the proceeding or refuse a discharge.[7] But if a discharge is granted without objection it will operate to release all debts provable in bankruptcy.

It may be doubted if a firm will be released from partnership debts without each partner is declared to be bankrupt, unless it be shown in the bankruptcy proceeding that there is no individual estate of any partner. The reason for this is, that each

[6] Judge Baker in Jarecki Mfg. Co. v. McElwaine, 107 Fed. Rep. 249, 5 Am. B. R. 751.

[7] *In re* Meyers, 96 Fed. Rep. 408, 2 Am. B. R. 707, s. c. 97 Fed. Rep. 737, 3 Am. B. R. 260, 2 N. B. N. 111; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* McFaun, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Hartman, 96 Fed. Rep. 593, 3 Am. B. R. 65; *In re* Morrison, 127 Fed. Rep. 186, 11 Am. B. R. 498.

individual estate is liable for partnership debts after paying the individual debts. A partner will not be granted a discharge unless he is individually adjudicated to be a bankrupt.[8]

When objections are filed to the discharge of partners who are bankrupts the trial may be joint, but the verdicts and judgments must be separate.[9]

[8] Strause v. Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225, 3 N. B. N. 276; *In re* Meyer (C. C. A., 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559; *In re* Hale, 107 Fed. Rep. 432, 6 Am. B. R. 35.

[9] *In re* George, No. 5325 Fed. Cas., s. c. 1 Low. 409.

CHAPTER XII.

MEETINGS OF CREDITORS.

§ 103. Proceedings after a reference generally.

A copy of the order referring a case to a referee is immediately sent by mail to the referee, or delivered to him personally by the clerk or other officer of the court.[1] All the proceedings thereafter, except such as are required by the act or by the general orders to be had before the judge, are regularly had before the referee.[1] Proofs of claims and other papers filed subsequent to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.[2]

The first step usually taken by a referee after having notice of the reference is to call the first meeting of the creditors of the person adjudged to be bankrupt. The purpose of this meeting is to afford the creditors of the bankrupt an opportunity to prove their claims, to appoint a trustee, to examine the bankrupt and to transact such other business as properly may be transacted, relating to the administration of the estate of the bankrupt.

§ 104. The time and manner of calling the first meeting of creditors.

The first meeting of the creditors of a bankrupt should be held not less than ten nor more than thirty days after the adjudication at the county seat of the county in which the bankrupt has had his principal place of business, resided or had his domicile. If that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court fixes a place

[1] Gen. Ord. 12.

[2] Gen. Ord. 2, 20; *In re* Oderkirk, 103 Fed. Rep. 779, 4 Am. B. R. 617.

for the meeting which is the most convenient for parties in interest.[1] If such meeting should by any mischance not be held within such time, the court or referee fixes the date as soon as may be thereafter when it shall be held.[2] The meeting must be held in strict accordance with the time and place specified.[3]

The creditors should have at least ten days' notice by mail to their respective addresses, as they appear in the list of creditors of the bankrupt of the first meeting.[4] The notice to creditors of the first meeting should also be published at least once and may be published such number of additional times as the court may direct.[5] The last publication must be at least once and may be published such number of additional times as the court may direct.[6] The last publication must be at least one week prior to the date fixed for the meeting.[5] The paper in which the notice is published is designated by order of court.[6]

The form of notice is prescribed by the supreme court,[7] and is regularly given by the referee.[8] In mailing these notices the referee is entitled to use a government penalty envelope and need not pay postage.[9]

§ 105. Who are entitled to vote at the first creditors' meeting.

Only creditors of the bankrupt are entitled to vote at the first or any subsequent meeting of the creditors. Not all of his creditors, however, are entitled to vote. A creditor is defined by the statute to include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy.[1]

[1] B. A. 1898, Sec. 55*a*. Compare R. S. Secs. 5034 and 5035.

[2] B. A. 1898, Sec. 55*a*, and Sec. 1, clause 7; Gen. Ord. 12, par. 2.

[3] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[4] B. A. 1898, Sec. 58*a*.

[5] B. A. 1898, Sec. 58*b*.

[6] B. A. 1898, Sec. 28.

[7] Form No. 18.

[8] B. A. 1898, Sec. 58*c*.

[9] This question has been ruled upon by the Post-office Department at Washington, Sec. 33, note.

[1] B. A. 1898, Sec. 1, clause 9.

In order to vote, a creditor must own an unsecured claim provable in bankruptcy and have actually proved it and had it allowed.[2]

An attorney at law can not vote without producing a letter of attorney, duly appointing him an attorney in fact.[3] The same rule applies to an agent or a proxy. Such letters of attorney should be filed by the referee as a part of his record.[4] Where a power of attorney is mislaid and not produced until the meeting is over, the attorney is properly refused the right to participate.[5]

Where a claim has been assigned after proof the real owner alone can vote, and if he holds several claims he can only cast one vote.[6] The managing officers of a bankrupt corporation, when *bona fide* creditors, have the same right to vote as any other creditor.[7] An individual creditor of one partner can not vote for a trustee for the partnership estate.[8] The creditors of the partnership appoint such trustee.[8] A joint or firm creditor, on the separate bankruptcy of one member of a firm, may vote at the creditors' meeting.[9] The reason for this dis-

[2] B. A. 1898, Sec. 56*a* and *b*; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[3] *In re* Blankfein, 97 Fed. Rep. 191, 3 Am. B. R. 165; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Richards, 103 Fed. Rep. 849; 4 Am. B. R. 631; *In re* Lazoris, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re* Scully, 108 Fed. Rep. 372, 5 Am. B. R. 716.

As to what constitutes a sufficient form of power of attorney, see *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[4] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[5] *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[6] *In re* Kenney Co., 136 Fed. Rep. 451, 14 Am. B. R. 611; Lowenstein v. McShane Mfg. Co., 130 Fed. Rep. 1007, 12 Am. B. R. 601; *In re* Messengill, 113 Fed. Rep. 366, 7 Am. B. R. 669; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526; *In re* Frank, No. 5050 Fed. Cas., s. c. 5 Ben. 164.

[7] *In re* Northern Iron Co., No. 10322 Fed. Cas., s. c. 14 N. B. R. 356.

[8] B. A. 1898, Sec. 5*b*.

[9] *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re* Webb, No. 17317 Fed. Cas., s. c. 4 Saw. 326; Wilkins v. Davis, No. 17664 Fed. Cas., s. c. 2 Low. 511; *In re* Downing, No. 4044 Fed. Cas., s. c. 1 Dill. 33; *In re* Stevens, No. 13393 Fed. Cas., s. c. 1 Saw. 397; *In re* Abbe, No. 4 Fed. Cas., s. c. 2 N. B. R. 75; *In re* Leland, No. 8228 Fed. Cas., s. c. 5 Ben. 168; *In re* Brick, 4 Fed.

tinction seems to be that each individual partner is liable for the firm debts and will be released from such liability by a discharge. A separate creditor can vote for the trustee in the separate bankruptcy of one of the partners although all the assets are joint.[10] It has been held that one of several joint creditors, who are not partners, can not vote without the consent of the others.[11]

Creditors holding claims which are secured or have priority are not in respect to such claims entitled to vote.[12] Such a creditor may surrender his security or preference at the first meeting, when it is of such a nature as to be effectually destroyed by such surrender, and thereupon he is entitled to vote like any other creditor.[13] The holder of a lien which is made void by the act no longer has any security and therefore may vote.[14] Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.[15] Where the debt consists of several parts, one of which is secured, he may vote on the unsecured portion.[16] If

Rep. 805-6; *Ex parte* Yale, 3 P. W. 25, note a.

There is authority holding the opposite view. *In re* Purvis, No. 11476 Fed. Cas., s. c. 1 N. B. R. 163; Hudgins v. Lane, No. 6827 Fed. Cas., s. c. 2 Hughes 361; *In re* Noonan, No. 10292 Fed. Cas., s. c. 10 N. B. R. 330; *In re* Little, No. 8390 Fed. Cas., s. c. 1 N. B. R. 341.

[10] *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554.

[11] *In re* Purvis, No. 11476 Fed. Cas., s. c. 1 N. B. R. 163.

[12] B. A. 1898, Sec. 56*b*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[13] *In re* Saunders, No. 12371 Fed. Cas., s. c. 2 Low. 444; B. A. 1898, Sec. 57*g*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[14] *In re* Scully, 108 Fed. Rep. 372, 5 Am. B. R. 716.

[15] B. A. 1898, Sec. 57*e*.

[16] B. A. 1898, Sec. 56*b*; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Parkes, No. 10754 Fed. Cas., s. c. 10 N. B. R. 82; *In re* Hanna, No. 6027 Fed. Cas., s. c. 5 Ben. 5.

the security is upon property of a third person,[17] the creditor may prove the whole claim and vote. Where the security is upon property exempted by law to the bankrupt, the creditor can vote on unsecured balance only.[18] It was held under the former act that where a mortgage creditor had sold the mortgaged premises after the adjudication and had become himself the purchaser he could not vote on the deficiency as an unsecured creditor.[19]

A creditor, charged with having received a preference, is not entitled to vote until the question of his preference is determined.[20] If he has received a preference, he is not entitled to vote until he surrenders such preference,[21] because the claim can not be allowed until after the preference is surrendered and he is not entitled to vote until after the claim is allowed. Where, under a general assignment made by a debtor more than a year before the commencement of proceedings in bankruptcy, a creditor therein preferred, had received a partial payment of his claim, he is not required, before being admitted to prove his debt in the bankruptcy proceedings and vote in the election of a trustee, to refund to the estate of the bankrupt the amount so received.[22] The claim is provable for the balance remaining unpaid.

In order to entitle a creditor to vote at a creditors' meeting it is not only necessary that he prove his claim, but, as has already been stated, it must be allowed. The statute expressly provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."[23]

Where claims are presented to which objection is made or

[17] *In re* Cram, No. 3343 Fed. Cas., s. c. 1 Hask. 80.

[18] *In re* Lautzenheimer, 124 Fed. Rep. 716, 10 Am. B. R. 720.

But see *In re* Stillwell, No. 13448 Fed. Cas., s. c. 7 N. B. R. 226; *In re* Tertelling, No. 13842 Fed. Cas., s. c. 2 Dill. 339.

[19] *In re* Hunt, No. 6884 Fed. Cas., s. c. 17 N. B. R. 205.

[20] *In re* Columbia Iron Works, 112 Fed. Rep. 234, 14 Am. B. R. 526.

[21] B. A. 1898, Sec. 57*g*.

[22] *In re* Folb, 91 Fed. Rep. 107, 1 Am. B. R. 22.

[23] B. A. 1898, Sec. 57*d*.

cause exists for continuing the consideration of the claim upon his own motion, how shall a referee proceed with reference to the voting? It is clear that so long as objections are pending against their claims creditors are not entitled to vote. Where such objections can be disposed of by the referee at once he should either sustain or overrule them, so as to permit the creditor to vote if he shall allow the claim. The bankrupt is regularly present at the first meeting of the creditors. Under section 7 it is his duty to examine the correctness of proofs of claims filed against his estate when ordered to do so by the referee or a judge, and to disclose the fact when any person tries to prove a false claim against his estate. It would therefore seem that with the assistance of the bankrupt and such evidence as may be introduced that the referee can ordinarily dispose of objections at the first meeting before a vote is taken. In case he can not conveniently do so, he has undoubted authority to continue the allowance of a particular claim. The act of 1867 expressly provided for continuing claims when the register entertained doubts of their validity or the right of the creditors to prove them or was of the opinion that the validity or right should be investigated by an assignee.[24]. It would seem that a cause which would justify the postponement of the proof under the former act would not necessarily be sufficient to justify a postponement under the present act.

Where a claim is regularly and properly proved, the referee should allow it and permit the creditor to vote at the first meeting, unless a clear case is made in opposition to it.[25] A claim which has been allowed may be reconsidered and re-allowed, or rejected in whole or in part, according to the equities of the case at any time before the estate has been closed.[26] The application for such re-examination may be made to the referee.[27] The judge may review the matter upon

[24] R. S. Sec. 5083; *In re* Bartusch, No. 1088, Fed. Cas., 9 N. B. R. 478; *In re* Jackson, No. 7123, Fed. Cas., s. c. 7 Biss. 280; *In re* Herrman, No. 6425, Fed. Cas., s. c. 4 Ben. 126; *In re* Orne, No. 10581, Fed. Cas., s. c. 1 Ben. 361.

[25] *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[26] B. A. 1898, Sec. 75*k*.

[27] Gen. Ord. 21, par. 6.

the question being certified to him.[28] The effect of allowing the claim or postponing the proof of it affects no right of a creditor except the right to vote at the creditors' meeting. If it is made to appear to a reasonable certainty that the result would be changed by such vote or votes, the referee or the judge may set aside the result of the vote and direct a new vote to be taken.[29] Where it appears that the exercise of the right to vote would have been barren of result the court will not delay proceedings in order to afford such creditors the opportunity to exercise such right.[30]

The referee and the bankrupt are required by law to attend the first meeting of the creditors, but neither of them are entitled to vote, because the business is transacted by the creditors alone.[31]

§ 106. How to conduct the first meeting of creditors.

The first meeting of creditors of a bankrupt should be held at the time and place specified in the notice for holding it.[1] It is not proper to hold a meeting before that time. If any creditor desires to have a voice in the business for which the meeting is called he should attend personally or by a duly authorized agent or attorney.[2] Where no creditor is present or represented the meeting is considered as held as fully and effectually as if creditors had appeared or been represented and the referee is not authorized to wait for or require a "quorum." [3] The judge or referee is required by statute to be present.[4] The referee regularly attends. The bankrupt is also required to be present, provided the meeting is had at a

[28] Gen. Ord. 27.

[29] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[30] *In re* Northern Iron Co., No. 10322 Fed. Cas., s. c. 14 N. B. R. 356; *In re* Lake Superior Ship Canal R. R. & Iron Co., No. 7997 Fed. Cas., s. c. 7 N. B. R. 376; *In re* Jackson. No. 7123 Fed. Cas., s. c. 7 Biss. 280.

[31] B. A. 1898, Sec. 56, Sec. 7, clause 1, and Sec. 55*b*.

[1] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[2] See Official Forms Nos. 20 and 21, see Forms Nos. 39 and 40, *post*.

[3] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Cogswell, No. 2959 Fed. Cas., s. c. 1 Ben. 388.

[4] B. A. 1898, Sec. 55*b*.

place not more than one hundred and fifty miles from his home or principal place of business.[5]

If creditors attend, the meeting should be organized at the hour designated in the notice or as soon thereafter as practicable. The judge or referee presides.[6] The duties of the referee as presiding officer are of a judicial character. His actions, therefore, under all circumstances should be free from reproach and above all suspicion of interest or partisanship. It is especially incumbent upon him in no manner to interfere with or influence the choice of a trustee by the creditors. The policy of the bankrupt law is to give the creditors of a bankrupt a free, deliberate, unbiased choice in the first instance of the person who is to take the assets and manage them.[7] It is also incumbent upon the creditors to take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act.[8] The referee presides at this meeting exactly in the same manner and in the same sense that a judge presides over his court.

Before proceeding with the other business the referee regularly allows or disallows the claims of creditors there presented.[9] Although creditors may prove their claims at any time after the commencement of the proceedings in bankruptcy, they do not generally prove them until the first meeting. In practice, therefore, where the estate is large and the creditors numerous, it may require a whole day or several days to take the proofs, elect the trustee and transact the other business that may properly come before the creditors. In such cases the meeting may be adjourned from day to day so as to furnish proper opportunity for all creditors to prove their debts and to come to an agreement in regard to the selection of a trustee if possible. The several adjournments will constitute but one meeting. It will be the first meeting

[5] B. A. 1898, Sec. 7; Official Forms Nos. 14 and 18, see Forms Nos. 31 and 35, *post; In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733.

[6] B. A. 1898, Sec. 55*b*.

[7] *In re* Smith, No. 12971 Fed. Cas., s. c. 2 Ben. 113.

[8] B. A. 1898, Sec. 55*c*.

[9] B. A. 1898, Sec. 55*b*.

of the creditors within the contemplation of the statute, whether held on the day designated in the notice or on the day to which the meeting assembled on that day has been adjourned.[10] What debts are provable[11] and the manner of making the proof[12] are considered in another place. The referee should include in his record a list of creditors who have proved their debts at the first meeting, together with their residence and the amount of each creditor's debt.[13]

The referee may publicly examine the bankrupt or cause him to be examined at the instance of a creditor before proceeding with the election of the trustee or with other business.[14] The examination should not be permitted at the instance of a creditor until after he has proved his claim. The proceedings relating to the examination of the bankrupt and other persons are treated under a separate head.[15] After the examination of the bankrupt an offer of composition may be made. It is not necessary to call a special meeting for this purpose.[16]

The principal business to be transacted at the first creditors meeting is the election of one trustee or three trustees.[17] The manner of conducting the election of the trustee is not prescribed by the statute, and is therefore left to be determined by the creditors themselves. They may either organize into a general meeting or vote in the same manner as at any other election. The preliminary ballots may be taken either *viva voce* or upon written slips. If on the first vote there is no choice made, a second, third, or any number of ballots may be had until the required concurrence is obtained. A creditor may change his vote at any time during the progress of such election.[18] Votes may be solicited for any particular trus-

[10] *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Phelps, No. 11071 Fed. Cas., s. c. 1 N. B. R. 525; *In re* Norton, No. 10348 Fed. Cas., s. c. 6 N. B. R. 297.

[11] Chap. XIII.

[12] Chap. XIV.

[13] Official Form No. 19; see Form No. 38, *post*.

[14] B. A. 1898, Sec. 55*b*.

[15] See Examinations, Chap. XIX.

[16] *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[17] B. A. 1898, Sec. 44.

[18] *In re* Pfromm, No. 11061 Fed. Cas., s. c. 8 N. B. R. 357.

tee. The creditors should canvass and discuss the different candidates so that the choice of a trustee may be made with full knowledge of all the facts and their bearings. The solicitation of votes must be properly exercised. Improper means and undue influence will not be permitted. Where such means are employed or where the voters had no right to vote the referee will reject the vote or disapprove the election.[19] The referee has power to reject improper votes,[20] but has no power to set aside the election for such reasons, but can merely refuse to confirm it and report his refusal to the judge, who alone can remove the trustee elected.[21] The court will often reject a trustee elected through the influence of the bankrupt,[22] but will not do so where all the general creditors have been paid in full.[23] The unanimous choice of creditors should not be disapproved on complaint of the bankrupt except in extreme cases.[24] When a final result is reached, it must be made a matter of record in the form prescribed.[25] The creditors who have appointed a trustee must sign the certificate, with their residences and amount of debts claimed and allowed. The reason for this requirement is, that if any dispute should arise in regard to the actual result of election there would be satisfactory evidence before the court to settle the controversy.

[19] *In re* McGill (C. C. A., 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel (C. C. A., 2d Cir.), 109 Fed. Rep. 861, at 865, 6 Am. B. R. 305; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508; *In re* Eastlake, 145 Fed. Rep. 68.

[20] *In re* McGill (C. C. A., 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

[21] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; Gen. Ord. 13.

[22] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Henschel (C. C. A. 2d Cir.), 109 Fed. Rep. 861, at 865; *In re* Rekerdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908.

[23] *In re* Morton, 118 Fed. Rep. 908.

[24] *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Mangan, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re* McKellar, 116 Fed. Rep. 547, 8 Am. B. R. 669.

After a creditor has signed this certificate he can not change his vote.[26] Where only one creditor appears at the first meeting of creditors and proves his debts he may appoint the trustee.[27]

If the creditors do not appoint the trustee the court should do so,[28] but only after the creditors have been given full opportunity;[29] thus where the creditors are unable to agree at their first meeting and a majority in number and amount request an adjournment for a reasonable time in order that they may come to some agreement the referee should grant such adjournment and should not himself appoint a trustee.[30] Where no request is made for a second meeting the referee may appoint the trustee after failure to elect one by the creditors.[31] Where two days have been used up in unsuccessful attempts by creditors to choose a trustee and one is needed at once the referee should appoint him.[32] Where the majority in number vote for one person for trustee and the majority in amount for another the referee may appoint.[33] Where a committee acquired by assignment the claims of several creditors it is entitled to one vote for trustee and not a vote for each creditor beneficially interested.[34] It has been held that the referee may appoint a trustee where it is impracticable to pass on a large number of contested claims at

[25] Official Form No. 22; see Form No. 41, *post*.

[26] *In re* Scheiffer, No. 12445 Fed. Cas., s. c. 2 N. B. R. 591.

[27] *In re* Haynes, No. 6269 Fed. Cas., s. c. 2 N. B. R. 227; Anon., No. 458 Fed. Cas., s. c. 1 N. B. R. 216.

[28] B. A. 1898, Sec. 44, and Sec. 1, clause 7; Official Form No. 23; see Form No. 42, *post; In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50.

[29] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

[30] *In re* Nice & Schreiber, 123 Fed. Rep. 987.

[31] *In re* Machin, 128 Fed. Rep. 315.

In Clark v. Pidcock (C. C. A. 3d Cir.), 129 Fed. Rep. 745, a trustee was appointed more than a year after the creditors' meeting.

[32] *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162.

[33] *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631; *In re* Kenney & Co., 136 Fed. Rep. 451.

[34] *In re* Kenney Co., 136 Fed. Rep. 451.

the first meeting,[35] but the better practice is to adjourn the election until such claims may be adjudicated.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.[36] If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.[36]

The number of votes for an election or to carry any matter of business is prescribed by the statute. Creditors pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed, and are present, except as otherwise provided by statute.[37]

It will be observed that in order to pass a matter it is necessary to have a majority of the votes of all who have proved claims and are present, and not merely a majority of the votes cast.[38] The claims of creditors who are not present are not counted,[39] and a creditor is not considered as present who has sent a proxy which has been rejected.[40] The number and amount of debts proved upon the first day is determined from the list required to be made by the referee.[41] It is also necessary that there be a majority in number and value of all the debts proved. By this mode of counting every debt upon which a vote has not been cast in favor of a question or person must be counted as a vote in the negative, if the creditor owing claim is present. A question is not carried which receives the

[35] *In re* Cohen, 131 Fed. Rep. 391, 11 Am. B. R. 439.

[36] Gen. Ord. 15.

[37] B. A. 1898, Sec. 56.

[38] *In re* Purvis, No. 11476 Fed. Cas., s. c. 1 N. B. R. 163; *In re* Scheiffer, No. 12445 Fed. Cas., s. c. 2 N. B. R. 591; B. A. 1898, Sec. 56.

[39] *In re* Henschel (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 7 Am. B. R. 662; *In re* Mackellar, 116 Fed. Rep. 547.

[40] *In re* Henschel (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 7 Am. B. R. 662; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Mackellar, 116 Fed. Rep. 547.

[41] Official Form No. 19; see Form No. 38, *post.*

majority of the debts proved unless the majority in number also constitutes a majority in the amount of claims proved. So, also, it is not carried where a majority in amount of debts proved is cast in favor of the question unless that majority in amount also constitutes a majority in number. The majority must be a joint majority of both the number and the value. The reason for this provision seems to be to prevent one large creditor from controlling the meeting to the detriment of other creditors, and at the same time to prevent several creditors having small claims from uniting to the injury of the large creditor, who may be the only one who has a real interest in the proceedings.

The creditors not only appoint the trustee or trustees, but they should fix the amount of the bond required.[42] They may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee the court must do so.[42]

No costs will be allowed out of the estate on contest between creditors for the purpose of electing a trustee.[43]

§ 107. Notice to trustee.

The appointment of a trustee by the creditors is subject to be approved or disapproved by the referee or the judge.[1] Ordinarily the referee makes the order approving the appointment. He thereupon immediately notifies him in person or by mail of his appointment.[2] The notice should contain a statement of the penal sum of the trustee's bond.[2] The trustee is required forthwith to notify the referee of his acceptance or rejection of the trusteeship.[3] Where the trustee accepts the trust he should immediately qualify.[4] If he declines to accept the trust a vacancy occurs in the office of trustee. The creditors are then entitled to have another

[42] B. A. 1898, Sec. 50c.

[43] *In re* Worth, 130 Fed. Rep. 927, 12 Am. B. R. 566.

[1] Gen. Ord. 13.

[2] Gen. Ord. 16; Official Form No. 24; see Form No. 43, *post*.

[3] Gen. Ord. 16.

[4] Trustees, Chap. XV.

meeting to elect a trustee.[5] The creditors may, of course, waive this privilege, in which case the judge or referee (usually the referee) appoints one or three trustees.[5]

§ 108. Other meetings of creditors.

Creditors may hold meetings other than the first one whenever it may be necessary to consider matters pertinent to the administration of the estate or other matters relating to the proceedings in bankruptcy. Where the schedule of a voluntary bankrupt discloses no assets, and no creditor appears at the first meeting, the court may direct that no trustee be appointed, and no meeting of the creditors other than the first meeting be called.[1]

A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.[2] Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.[3] The judge or referee is required to call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.[4]

Creditors who have proved their claims at the first meeting or have proved them subsequently are entitled to vote at these meetings subject to the restrictions contained in section 56. Creditors, whether they have proved their claims or not, are

[5] B. A. 1898, Sec. 44.
[1] Gen. Ord. 15.
[2] B. A. 1898, Sec. 55*d*.
[3] Gen. Ord. 25.
[4] B. A. 1898, Sec. 55*e*, and Sec. 1, clause 7.

entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of all such meetings of creditors.[5] The referee regularly gives this notice.[6]

The referee is not required to be present or preside at these meetings, but in practice he usually does so. The bankrupt is not required to attend such meetings unless specially ordered to do so. There is no form prescribed for conducting the business or taking the votes except that the creditors can only pass upon matters submitted to them at such meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present.[7] Such meetings are properly guided by the rules and usages of parliamentary bodies.[8]

Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.[9]

[5] B. A. 1898, Sec. 58*a*. See *In re* Mills, No. 9610, Fed. Cas., s. c. 7 Ben. 452; Anon., No. 457 Fed. Cas., s. c. 1 N. B. R. 122.

[6] B. A. 1898, Sec. 39, clause 4, and Sec. 58*c*.

[7] B. A. 1898, Sec. 56*a*.

[8] *In re* Merchants' Ins. Co., No. 9442 Fed. Cas., s. c. 6 Biss. 252.

[9] B. A. 1898, Sec. 55*f*.

CHAPTER XIII.

WHAT DEBTS ARE PROVABLE.

§ 109. Provable debts defined.

Debts of the bankrupt may be proved and allowed against his estate,[1]

First, which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

Second, debts due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

Third, debts founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt.

Fourth, debts founded upon an open account, or upon a contract express or implied.

Fifth, debts founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

The five classes of debts quoted above are contained in Sec. 63*a* and include every class of debt provable in bankruptcy. If a claim does not fall within one of these classes it is not provable.

[1] B. A. 1898, Sec. 63. Compare R. S. Secs. 5067 to 5072.

In order that a debt, demand or claim may be proved and allowed against the estate of a bankrupt it must be liquidated.[2]

In Section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct and may thereafter be proved and allowed against his estate. Par. *b* of Sec. 63 adds nothing to the class of debts which may be proved under par. *a* of the same section.[3] Its purpose is to permit an unliquidated claim coming within the provisions of Sec 63*a* to be liquidated as the court may direct. The court may adopt any procedure appropriate to the particular case, whether it be submission to a jury on an issue framed, or an adjudication on evidence before the referee or judge, or some other method.[4]

Unliquidated claims which may be liquidated and proved under this provision are numerous and varied. Familiar examples are damages for breach of executory contracts, damage for breach of covenants in a contract and stockholder's liability.[5] Notes and contracts to deliver specific articles of merchandise may be liquidated.[6]

The rights of creditors to prove debts and share in the distribution of the estate of the bankrupt are fixed by the status of their claims at the time of filing the petition in bankruptcy.[7]

[2] B. A. 1898, Sec. 63*b*. *In re* Silverman, 101 Fed. Rep. 219, 2 N. B. N. 760, 4 Am. B. R. 83; *In re* Big Meadow Gas Co., 113 Fed. Rep. 974, 7 Am. B. R. 697. But see *In re* Manhattan Ice Co. (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 8 Am. B. R. 569.

[3] See observation of Mr. Justice Peckham in Dunbar v. Dunbar, 190 U. S. 340, 350, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Hirschman, 104 Fed. Rep. 60, 4 Am. B. R. 715.

[4] *In re* United Button Co., 130 Fed. Rep. 495, 15 Am. B. R. 390.

[5] Fourth National Bk. v. Franklyn, 120 U. S. 747, 30 L. Ed. 825; Garrett v. Sayles, 1 Fed. Rep. 371; James v. Atlantic Delaine Co., No. 7179 Fed. Cas., 11 N. B. R. 390; Gibson v. Lewis, No. 5398 Fed. Cas., 11 N. B. R. 247; *In re* Rouse, 40 Law Bul. (Ohio) 220.

[6] Chandler v. Windship, 6 Mass. 310; McMullen v. Bank of Penn., 2 Penn. St. 243.

[7] Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223;

The present act admits to proof only those claims which can be liquidated by legal proceedings instituted at the time of bankruptcy. Other liabilities of the bankrupt are deemed so far contingent that they cannot be proved in bankruptcy, nor are they released by the bankrupt's discharge.[8]

A debt contracted by the bankrupt subsequent to the filing of the petition cannot be proved in bankruptcy.[9] The payment of such debts may be sought out of property acquired after the adjudication of bankruptcy at any time. The bankrupt is not released from such debts by discharge in bankruptcy.

Debts secured by a mortgage lien or other kind of security are not provable under this section until the secured creditor surrenders such preferences except for the amount each claim exceeds the value of its security.[10] This section relates to debts, demands and claims only which are not preferred or secured, and which have no priority over any other debts. They are the debts, demands and claims of the general creditors against the general assets of the bankrupt at the time the petition was filed.

§ 110. What is a "debt."

It is to be observed that debts only are provable under the first paragraph of section 63—the first five clauses above. To

Phillips v. Dreher Shoe Co., 112 Fed. Rep. 404, 7 Am. B. R. 326; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 374; *In re* Graff, 8 Am. B. R. 744.

[8] *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[9] *In re* Merrell, 19 Fed. Rep. 874; *In re* Ward, 12 Fed. Rep. 325; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602.

But see Spalding v. Dixon, 21 Vt. 45, where it was held under the act of 1841, that a debt arising after the petition filed and before the adjudication was provable, and therefore barred by a discharge in bankruptcy.

[10] B. A. 1898, Sec. 57*e*, *f* and *g*. See Rights of Secured Creditor, Sec. 203, *post*.

ascertain, therefore, what is provable under these provisions it is necessary to inquire at the outset what is included in the word "debts."

A debt, as defined by the act itself, includes "any debt, demand or claim provable in bankruptcy."[1] This definition does not throw much light on its meaning in this connection, although it fully defines it wherever it is used in any other part of the act.

The word "debt" seems to have been used in other bankrupt acts[2] as defined by Mr. Justice Blackstone. He said: "The legal acceptation of debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum; a bill or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it."[3] That this is the sense in which debt is used in this section is fairly to be inferred from the context. A sum of money due is deemed fixed and certain when it can be ascertained from fixed data by mere computation.

If this is the meaning of debts in this section it is clear that a judgment for a fine or penalty,[4] or a claim for alimony,[5] or any other claim not founded upon an agreement or contract, however just or lawful in itself, is not provable in bankruptcy. A claim against a father to pay for

[1] B. A. 1898, Sec. 1, clause 11.

[2] *In re* Sutherland, No. 13639 Fed. Cas., Deady, 416; *In re* Lachemeyer, No. 7966 Fed. Cas. ,18 N. B. R. 270; *In re* Foye, No. 5021 Fed. Cas., 2 Low. 399; Sigsby v. Willis, No. 12849 Fed. Cas., 3 Ben. 371.

[3] Blackstone's Com. 154. See also Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829.

[4] *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590; *In re* Sutherland, No. 13639 Fed. Cas., Deady, 416; Spalding v. New York, 4 How. 21, affirming 7 Hill (N. Y. 301; s. c. 10 Paige (N. Y.) 284; Wilson v. Nat. Bank, 3 Fed. Rep. 391; Macey v. Jordan, 2 Den. (N. Y.) 570.

As to penalties due the United States, a state or municipality, see B. A. 1898, Sec. 57*j*.

[5] Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

the support of his minor children which at common law he is bound to support is not such a debt as may be proved in bankruptcy.[6] Such claims might be enforced at law or in equity.[7]

In construing state laws relating to insolvents a broader meaning has been given to the word "debt." Thus it has been said that "the word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations rising under simple contract to a very wide extent, and its popular sense includes all that is due to a man under any form of obligation or promise." [8]

§ 111. Equitable debts—Assignee's expenses, etc.

It has been repeatedly held in England that an equitable as well as a legal debt may be proved in bankruptcy.[1] And the same rule would appear to be established in this country under the former bankrupt acts.[2]

Thus, a solvent partner upon winding up the partnership is entitled to prove against bankrupt partners the share of the loss which each partner should have borne as a debt against his separate estate.[3] The reason for this is that the solvent

[6] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528.

[7] Stockwell v. U. S., 13 Wall. 531, 20 L. Ed. 491.

That judgments to enforce a moral or natural duty, as for seduction or the support of a bastard, are not discharged—not being debts in the sense that word is used in bankruptcy, see *In re* Cotton, No. 3269 Fed. Cas., 2 N. Y. Leg. Obs. 370; Comm. v. Erisman, 21 Pitts. L. Jour. 69; Nassau v. Parker, 2 Penn. L. Jour. 298.

[8] Gray v. Bennett, 3 Met. (Mass.) 526. This view was approved by Mr. Justice Story in Carver v. Mf. Co., No. 2485 Fed. Cas., 2 Story 432. But neither of the cases arose under a bankrupt statute.

[1] *Ex parte* Yonge, 3 Ves. & B. 31; Jeffs v. Wood, 2 P. Williams 128; Murphy's Case, 1 Schoaels 8 L. 44; *Ex parte* Watson, 4 Madd. 477.

[2] *In re* Kelly, 18 Fed. Rep. 528; *In re* Fortune, No. 4955 Fed. Cas., 1 Low. 306; *In re* Secor, 18 Fed. Rep. 319; *In re* Wells, 4 Fed. Rep. 68; Butcher v. Forman, 6 Hill (N. Y.) 583.

[3] *Ex parte* Watson, 4 Madd. 477; Sigsby v. Willis, No. 12489 Fed. Cas., 3 Ben. 371; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815.

partners having paid all of the joint debts of the firm are regarded as standing in the light of sureties or persons liable for him, and therefore entitled to come in and prove in respect to the bankrupt's share of the copartnership debts.[4] So also where a trustee demanded wagons of the bankrupt which were in the possession of a bailee it was held that the bailee was entitled to an equitable compensation for storage.[5] So also charges against the estate for expenses incurred in the administration of it, as wages, rent, etc., are provable debts in bankruptcy.[6] Creditors of a bankrupt "get rich quick" concern have been allowed to prove claims for money advanced on false representations (although intended by the creditors to be used in gambling) on the ground that the bankrupt debtor was a trustee for them.[7] In the absence of any authoritative state decision or statute governing the case, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money on the bankruptcy of the vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.[8]

An assignee for the benefit of creditors and his attorney may prove for services, rendered both prior and subsequent to the filing of the petition in bankruptcy, which were beneficial to the estate.[9] Attorneys for a receiver appointed by a state court prior to bankruptcy are entitled to fees only so far as their services were beneficial to the estate.[10] An attorney may

[4] *Ex parte* Yonge, 3 Ves. & B. 31; Aflalo v. Fourdrinier, 6 Bing. 306; Sigsb yv. Willis, No. 12489 Fed. Cas., 3 Ben. 371.

[5] *In re* Kelly, 18 Fed. Rep. 528.

[6] *In re* Wells, 4 Fed. Rep. 68; *In re* Secor, 18 Fed. Rep. 319; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Allen, 95 Fed. Rep. 512, 3 Am. B. R. 38.

[7] *In re* Arnold & Co., 133 Fed. Rep. 789; 13 Am. B. R. 320.

[8] *In re* Peasley, 137 Fed. Rep. 190, 14 Am. B. R. 496.

[9] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1, overruling *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; Stearns v. Flick, 103 Fed. Rep. 919, 4 Am. B. R. 723.

[10] *In re* Zier & Co. (C. C. A. 7th Cir.), 142 Fed. Rep. 102, 15 Am. B. R. 646. Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

prove for services rendered the bankrupt in preparing a deed of assignment, which was afterwards set aside by bankruptcy proceedings.[11]

§ 112. Contingent demands and liabilities not debts.

Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruptcy, nor is it released by the bankrupt's discharge.[1] A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened.[2] *Non constat* the contingency will not happen.

Thus, under the trustee laws of Massachusetts, it has been held that the wages of a sailor, being contingent on the arrival of the ship, are not a debt until the ship has arrived, and, therefore, until then not attachable.[3] So of a covenant to pay rent quarterly. It creates no debt until it becomes due, for before that time the lessee may quit, with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor, in either of which cases he will be discharged from his covenant.[4] So a contract between the shippers of a cargo and the owners of the ship, that the latter shall receive a share of the profits, does not create a debt from the former to the latter until the termination of the voyage.[5] Under a contract between a

[11] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[1] *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[2] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1184, 10 Am. B. R. 139; Godding v. Roscenthal, 180 Mass. 43; Morgan v. Wordell, 178 Mass. 350; Insley v. Garside (C. C. A. 9th Cir.), 121 Fed. Rep. 699, 10 Am. B. R. 52.

[3] Wentworth v. Whittemore, 1 Mass. 471.

[4] Wood v. Partridge, 11 Mass. 488. See also Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232.

[5] Davis v. Ham, 3 Mass. 33; Frothingham v. Haley, 3 Mass. 68.

building contractor and a sub-contractor that the building contractor shall not pay until he has been paid by the owner the sub-contractor has no provable claim against the building contractor until the owner pays the building contractor.[6]

So a claim for damages upon a bond conditioned upon the faithful performance of certain duties is not a debt until the contingency has happened and the damage has been assessed.[7] But it has been held that where an agreement indemnifying a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor being unable to complete the contract, and the contractor subsequently abandoned the contract, and was declared a bankrupt, the surety became a creditor of the bankrupt from the date of the latter's abandonment of the contract, though the amount of the surety's claim depended upon contingencies, and was not liquidated.[8] Before the day at which rent is covenanted to be paid it is in no sense a debt. It is neither *debitum* nor *solvendum*.[9]

A contract by a husband to pay his wife a certain sum annually during her lifetime or widowhood is not provable in bankruptcy.[10]

It has been held that the bond of the bankrupt to secure payment to the obligee of an annuity for life may be proved under Sec. 63*a*, clause 1,[11] and that the creditor might prove under Sec. 63*a*, clause 4, against the estate of the bankrupt after the liability had become fixed, where the contingency was that the bankrupt was the endorser of commercial paper not due at the time of filing the petition.[12] Where an adminis-

[6] *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221.

[7] Ellis v. Ham, 28 Me. 385; Woodward v. Herbert, 24 Me. 358; Godding v. Roscenthal, 180 Mass. 43.

[8] Wood v. U. S. Fidelity & Guarantee Co., 143 Fed. Rep. 424, 16 Am. B. R. 21.

[9] Deane v. Caldwell, 127 Mass. 244.

[10] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[11] Cobb v. Overman (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324.

[12] Moch v. National Bank (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923.

trator commits a breach and dies before bankruptcy of his surety damages for breach is provable against the estate of the surety.[13] No provable claim exists where the breach was after bankruptcy.[14]

It was held under the act of 1841, which provided for proving uncertain and contingent demands, that so long as the demand remained wholly uncertain whether a contract or engagement would ever give rise to an actual debt or liability and there was no means of removing the uncertainty by calculation, such contract or engagement was unprovable under the act.[15]

§ 113. Debts which are a fixed liability provable.

Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, without any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.[1]

In order to be a debt provable under this provision two things must concur. *First*, it must be a debt with a fixed liability absolutely owing at the time of the filing of the petition; and, *second*, the debt must be evidenced by a judgment or an instrument in writing.

Under this provision debts may be proved which are due at the time of filing the petition in bankruptcy on judgments, bonds for a determinate sum, some debts arising under contract, notes, bills of exchange, checks, etc. It should be observed that many debts may be proved under this clause and also under clause 4 of the same section, which is broader in its terms and includes debts which cannot be proved under this section. What constitutes a fixed liability absolutely owing

[13] Harmon v. McDonald, 187 Mass. 578.

[14] Loring v. Kendall, 1 Gray (Mass.) 305.

[15] Riggen v. Magwire, 15 Wall. 549, 21 L. Ed. 232.

[1] B. A. 1898, Sec. 63*a*.

and what are debts evidenced by a judgment, or an instrument in writing, is further considered in the next three paragraphs.

§ 114. What constitutes a fixed liability absolutely owing.

A fixed liability absolutely owing means that the obligation to pay exists at the time of filing the petition and is sufficiently definite in amount to permit of computation. It has been held that the bond of a bankrupt to secure the payment to the obligee of an annuity for life may be proved under this section.[1] A judgment note waiving exemptions is a provable debt.[2] The liability of a bankrupt as surety on the bond of an administrator is held to be a fixed liability absolutely owing where no final decree has been rendered in the state court adjudging the liability of the principal.[3]

Contingent debts or liabilities or demands, the valuation or estimation of which it is substantially impossible to prove, are not provable debts under this clause,[4] or a claim for a breach of a covenant in a lease where no breach is shown prior to bankruptcy,[5] or an attorney's fee stipulated in a judgment note where the note has not been placed in the hands of an attorney for collection prior to the filing of the petition in bankruptcy,[6] or for the breach of a contract of lease where the lessor has re-entered and taken possession of the leased property.[7] The liability of a bankrupt as surety becomes a fixed

[1] Cobb v. Overman (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324, overruling Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788.

[2] Claster v. Soble, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446.

[3] Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 12 Am. B. R. 104, reversing *In re* Wiseman, 123 Fed. Rep. 185, 10 Am. B. R. 545.

[4] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[5] *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490.

[6] *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re* Keeton, 126 Fed. Rep. 462, 11 Am. B. R. 367; *In re* Gerson (C. C. A 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Gebhard, 140 Fed. Rep. 571, 15 Am. B. R. 381.

But see Merchants' Bank v. Thomas (C. C. A. 5th Cir.), 121 Fed. Rep. 306, 10 Am. B. R. 299.

[7] Lamson Consol. Store Service v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335.

liability by maturity notice and non-payment of the debt,[8] but may be proved under clause 4 as a contract of endorsement.[9]

The word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. Whether the debt is owing or not is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable, is a debt absolutely owing without regard to the fact whether it be payable now or at a future time. The provision requires the debt to be absolutely owing, and expressly includes both classes of debts; namely, those debts which are payable at the date of the commencement of bankruptcy and those debts which are payable at a subsequent date. It is sufficient if the debt is a fixed liability absolutely owing when the petition in bankruptcy is filed.[10]

It is the actual value of the debt owing at the commencement of bankruptcy proceedings that is provable.[11] This provision establishes that date as the time at which the liability is to be ascertained and determined. Accrued interest at that date is as much a part of the indebtedness as the principal.[12] But interest accruing thereafter is not provable. The question of interest is further considered elsewhere.[13]

§ 115. Judgment debts provable.

It may be stated as a general rule that judgment debts are provable in bankruptcy. The statute recognizes two classes

[8] *In re* Schaefer, 104 Fed. Rep. 973, 5 Am. B. R. 92*n*; *In re* Gerson, 105 Fed. Rep. 891, 5 Am. B. R. 89, affirmed (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[9] *In re* Gerson (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

[10] B. A. 1898, Sec. 63*a*, clause 1.

[11] *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Merchants' Bank v. Thomas (C. C. A. 5th Cir.), 10 Am. B. R. 299, 121 Fed. Rep. 306; Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 12 Am. B. R. 104, reversing *In re* Wiseman, 123 Fed. Rep. 185, 10 Am. B. R. 545.

[12] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832; *In re* Bartenbach, No. 1068 Fed. Cas., 11 N. B. R. 61; *In re* Haake, No. 5883 Fed. Cas., 2 Saw. 231; *In re* New Brunswick Carpet Co., 4 Fed. Rep. 514.

[13] Sec. 117, *post*.

of judgment debts which may be proved. *First,* a debt evidenced by a judgment obtained prior to the commencement of bankruptcy proceedings;[1] and, *second,* a debt founded upon a provable debt reduced to judgment pending bankruptcy proceedings.[2]

JUDGMENT DEBTS PRIOR TO BANKRUPTCY.—In order to constitute a judgment debt provable under the first clause of section 63 a judgment must have been actually rendered.[3] A mere verdict in an action is not sufficient. A certified copy of the judgment is evidence of the debt.[4] A judgment carries also costs and interest to the date of the filing of the petition, where it would do so under the laws of the state in which it was rendered. Such costs and interest form a part of the provable debt in such cases.[5] A judgment for costs is regularly a provable debt.[6] A judgment for breach of promise of marriage is a provable debt.[7]

It should be observed that only a judgment which is an evidence of debt is provable. If the nature of the liability, the original cause of action, is not debt, it cannot be proved under this clause. Thus it is not a provable debt where the judgment is for a fine or penalty imposed for punishment under the state law,[8] or for alimony whether in arrear at the time of adjudication in bankruptcy or for alimony accruing since

[1] B. A. 1898, Sec. 63, clause 1; *In re* McCauley, 101 Fed. Rep. 223, 4 Am. B. R. 122; *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544, 3 N. B. N. 189.

[2] B. A. 1898, Sec. 63, clause 5; *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258.

[3] Black v. McClelland, No. 1462 Fed. Cas., 12 N. B. R. 481; Crouch v. Gridley, 6 Hill (N. Y.) 250; *Ex parte* Columbian Ins. Co. No. 3037 Fed Cas., 2 Low. 5.

[4] *Ex parte* Anderson, 14 Q. B. D. 606.

[5] *Ex parte* O'Neil, No. 10527 Fed. Cas., 1 Low. 163.

[6] Graham v. Pierson, 6 Hill (N. Y.) 247.

[7] *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258; *In re* McCauley, 101 Fed. Rep. 223, 4 Am. B. R. 122; Finnegan v. Hall (N. Y. Sup. Ct.), 6 Am. B. R. 648.

[8] *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590.

But see *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

that adjudication,[9] because a judgment for alimony or an allowance in the nature of alimony is not a debt within the meaning of that word as used in Sec. 63 of the bankrupt act, but is a penalty imposed for failure to perform a duty, or for the support of minor children,[10] or a judgment for seduction, or for the commission of an immoral act, or for the failure to perform a natural duty.[11]

A judgment, if not outlawed, obtained at any time prior to the filing of the petition, even within four months, is provable.[12] It should be observed that while a judgment lien may be invalid as a preference for the reason that it was obtained within four months, the judgment is not for this reason invalid as an evidence of the debt. The creditor may not be entitled to a preference, but still be entitled to prove his debt as a general creditor.[13] But where the judgment no longer exists it is not evidence of the debt, and the proof of the claim will not be allowed.[14] Where a writ of error has been prosecuted the judgment debt may still be proved,[15] subject to hav-

[9] Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390, 13 Am. B. R. 1; Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

But see Arrington v. Arrington (Sup. Ct. N. C.), 10 Am. B. R. 103, where it was held that a final judgment for alimony entered in another state upon a decree for absolute divorce is a provable and dischargeable debt.

In England alimony is neither discharged nor provable in bankruptcy. Linton v. Linton (1885), 15 Q. B. D. 239; Hawkins v. Hawkins (1894), 1 Q. B. D. 25; Watkins v. Watkins (1896), Prob. 222; Kerr v. Kerr (1897), 2 Q. B. 439.

[10] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101.

[11] Consult Colwell v. Tinker (N. Y. Sup. Ct.), 6 Am. B. R. 434; Distler v. McCauley (N. Y. Sup. Ct.), 6 Am. B. R. 491; *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; Burnham v. Pidcock (N. Y. Sup. Ct. App. Div.), 5 Am. B. R. 590.

[12] *In re* Farmer, 116 Fed. Rep. 763, 9 Am. B. R. 19.

[13] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506.

[14] *In re* Bruce, No. 2044 Fed. Cas., 6 Ben. 515; *In re* Lipman, 94 Fed. Rep. 353, 2 Am. B. R. 46

[15] *In re* Sheehan, No. 12737 Fed. Cas., 8 N. B. R. 345.

ing the dividends withheld until the appellate court disposes of the writ of error.

How far a court of bankruptcy, at the instance of a trustee or creditors, may go behind a judgment offered for proof is not free from doubt. The American cases under the act of 1867 incline strongly to the opinion that a judgment valid against the debtor and not in fraud of creditors, cannot be attacked in a court of bankruptcy.[16] But where the judgment is void for fraud or want of jurisdiction in the court rendering it, it may be examined into by a court of bankruptcy in which it is offered for proof. If there be an intermediate case in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, a court of bankruptcy usually will leave the trustee to that remedy, postponing the proof in the meantime.[16]

The English rule seems to be somewhat broader. A judgment is there deemed *prima facie* evidence of a provable debt, but if there are circumstances which cast suspicion upon the judgment or on the debt on which it was founded, the court has the right to call upon the claimant to prove the consideration for the debt.[17]

It has been held under the present act that "the court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action." [18]

Debts Reduced to Judgment Pending Bankruptcy.— Another class of judgment debts which may be proved in bankruptcy are those "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge,

See *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

[16] *In re* Burns, No. 2182 Fed. Cas., 1 N. B. R. 174; Campbell's Case, No. 2349 Fed. Rep., 1 Abb. U. S. 185; *Ex parte* O'Neil, No. 10527 Fed. Rep. 1 Low. 163; McKensey v. Harding, No. 8866 Fed. Cas., 4 N. B. R. 38.

[17] *Ex parte* Anderson, 14 Q. B. D. 606; *Ex parte* Lennox, 16 Q. B. D. 315; *Ex parte* Revell, 13 Q. B. D. 720; *Ex parte* Seaton, 8 Mor. 97.

[18] Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." [19]

Two elements are necessary to make a judgment debt of this character provable. *First,* it must be founded upon a provable debt; and, *second,* it must be reduced to judgment pending bankruptcy proceedings before the bankrupt's application for a discharge is considered by the court. In this class all debts are on the same basis in respect to interest as other claims.[20] The actual value of the debt at the date of the filing of the petition is what is provable after costs have been deducted.

There was much conflict of opinion with reference to whether this class of debts was provable under the former bankrupt acts. Under these acts, as under the present statute, debts created during bankruptcy were not provable. The division of opinion grew out of the application of the doctrine of merger. Some judges conceived the debt existing at the time of filing the petition to be merged in the judgment obtained thereafter and to become a new debt, as of the date of the judgment, and hence not provable.[21] Others held the view that the judgment retained the character of the indebtedness out of which it arose, and was not to be regarded as a new debt arising subsequently to the filing of the petition.[22]

[19] B. A. 1898, Sec. 63, clause 5; *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* Fife, 109 Fed. Rep. 880, 6 Am. B. R. 258.

[20] See Sec. 117, *post.*

[21] *In re* Williams, No. 17705 Fed. Cas., 2 N. B. R. 229; *In re* Mansfield, No. 9049 Fed. Cas., 6 N. B. R. 388; *In re* Gallison, No. 5203 Fed. Cas., 2 Low. 72; Sanford v. Sanford, 58 N. Y. 67; Bradford v. Rice, 102 Mass. 472; Cutter v. Evans, 115 Mass. 27; Woodbury v. Perkins, 5 Cush. 86; Ellis v. Ham, 28 Me. 385; Uran v. Houdlette, 36 Me. 15; Pike v. McDonald, 32 Me. 418; Kellogg v. Schuyler, 2 Denio (N. Y.) 73; Roden v. Jaco, 17 Ala. 344; McCarthy v. Goodwin, 8 Mo. App. 380.

[22] *In re* Crawford, No. 3363 Fed. Cas., 3 N. B. R. 698; *In re* Brown, No. 1975 Fed. Cas., 5 Ben. 1; Barnes v. United States, No. 1023 Fed Cas., 12 N. B. R. 526; *In re* Vickery, No. 16930 Fed. Cas., 3 N. B. R. 696; Fox v. Woodruff, 9 Barb. 498; Dresser v. Brooks, 3 Barb. 429; Johnson v. Fitzhugh, 3 Barb. Ch. 360; Clark v. Rowling, 3 N. Y. 216; Stockwell v. Woodward, 52 Vt. 234; Harrington v. McNaughton, 20 Vt. 293; Blanford v. Foote, 1 Cowp. 138; Rogers v.

The latter view was taken by the supreme court when the matter came before it for the first time, about eight years after the bankrupt law had been repealed.[23] No such conflict of opinion can arise under the present statute, which expressly declares such judgments to be provable debts.

§ 116. Debts evidenced by an instrument in writing.

A debt which is a fixed liability as evidenced by an instrument in writing and absolutely owing at the time of the filing of the petition is provable.[1] A debt created by oral agreement or upon an open account is provable under another provision of the 63d section, but not under the first clause.[2] An instrument in writing, as used in this connection, is a written document which is the legal evidence of a fixed liability to pay a debt, such as bonds for a determinate sum, notes, bills of exchange, checks, etc. Checks, however, are not evidence of a debt accruing to a bank by reason of an overdraft.[3]

Where the bankrupt is the maker, or the one primarily bound by the written instrument, the debt evidenced by the written instrument is clearly provable. But it is the debt due in equity which is provable and not the penalty.[4] It has been held that where a person previous to becoming a bank-

Ins. Co., 1 La. Ann. 161; Imlay v. Carpentier, 14 Cal. 173; Stratton v. Perry, 2 Tenn. Ch. 633; Raymond v. Merchant, 3 Cow. 147; Dick v. Powell, 2 Swan 632; McDonald v. Ingraham, 30 Miss. 389; Anderson v. Anderson, 65 Ga. 518; Betts v. Bagley, 12 Pick. 572; Dawson v. Hartsfield, 79 N. C. 334; Dinsdale v. Eames, 4 Moore 350; 2 Brod. & B. 8.

[23] Boynton v. Ball, 121 U. S. 457, 466, 30 L. Ed. 985.

[1] B. A. 1898, Sec. 63, clause 1.

[2] B. A. 1898, Sec. 63, clause 4.

[3] *In re* New Brunswick Carpet Co., 4 Fed. Rep. 515; Fletcher v. Manning, 12 M. & W. 571.

[4] *Ex parte* Fidgeon, 4 Dea. 217; *Ex parte* Maclean, 2 Mont. D. & D. 564, s. c. 6 Jur. 609. See also Wilson v. Nat. Bank, 3 Fed. Rep. 391.

In *Ex parte* Capper, 4 Chan. D. 724, it was held that where a building contract provided that in case the contract should not be in all things duly performed by the contractors they should pay to the employer 1000*l* as and for liquidated damages, yet that the 1000*l* was in the nature of a penalty, and proof could only be had for the actual damage sustained.

rupt was liable on a bond, by the terms of which he became a continuing guarantor of notes discounted by a certain bank for a company of which he was the president, and at the time of his bankruptcy the bank held a note so discounted indorsed by him, the fact that a renewal note was given after the filing of his petition did not prevent the debt from being proved as a claim against his estate.[5]

Notes given by a corporation to pay for shares of its own stock are not provable debts against the estate of the corporation.[6]

THE LIABILITIES OF BANKRUPTS AS SURETIES, ENDORSERS, ETC.—A provable debt may arise with reference to an endorser or surety, *first,* where the bankrupt is the endorser or the surety; *second,* where another person is the surety or an endorser for the bankrupt.

In case the bankrupt is the person secondarily liable as an endorser or a surety, it is necessary that the liability has become absolute and fixed, as by maturity notice and non-payment of the debt prior to bankruptcy proceedings, to be provable under the first clause of Sec. 63,[7] but the contract of endorsement may be proved under clause 4 of the same section.[8]

[5] *In re* Letchworth, 19 Fed. Rep. 873. But see *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

[6] *In re* Smith Lumber Co., 132 Fed. Rep. 618, 13 Am. B. R. 123.

[7] *In re* Schaefer, 104 Fed. Rep. 973, 3 N. B. N. 261, 5 Am. B. R. 92*n*; *In re* Gerson, 105 Fed. Rep. 891, 5 Am. B. R. 89, 3 N. B. N. 249, affirmed (C. C. A. 3d Cir.) 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Loder, No. 8457 Fed. Cas., 4 Ben. 305; *In re* Bruce, No. 2044 Fed. Cas., 6 Ben. 515.

In McNeil v. Knott, 11 Ga. 142, Segur and Crawford made a note for $100, payable Christmas next thereafter to Henry Kunkle or bearer. Kunkle, the payee, transferred the note by delivery to Knott, who endorsed it "to be liable in the second instance" to McNeil. Segur paid off and discharged the note to Kunke while the note was in his possession. McNeil then sued Knott, who, pending the action, had been discharged under the bankrupt act of 1841. Knott pleaded discharge in bankruptcy. The court held the debt to be a provable debt in bankruptcy and the plea of discharge in bankruptcy a good defense.

[8] Compare R. S. Sec. 5069.

In re Gerson (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11, affirming 105 Fed. Rep. 891, 5 Am. B. R. 89.

It has been held that where a city treasurer defaulted and the city council passed a resolution that the sureties might give their individual bonds for their *pro rata* of the balance due, but that the old bonds should be retained and remain in full force, that the estates of the bankrupt's sureties who did not give such bonds were liable, and that the city might prove against their estates for the whole debt.[9]

Where the holder has forfeited his right, or the debt has been discharged by payment, no provable debt exists against the estate of the bankrupt. Thus, where the note is barred by the statute of limitations, or where a note payable on demand is not presented for payment, and no demand made within a reasonable time, the endorser is released.[10] Where the maker has paid a part of the note to the holder, the holder can prove against the bankrupt's estate only for the balance not paid.[11] So also where a settlement has been, with leave of court, made with the makers of a note at forty cents on the dollar, the creditor is only entitled to prove for sixty percent against the estate of the bankrupt sureties.[12] Creditors are entitled to dividends from the estate of a bankrupt endorser only on the balance due after collaterals have been exhausted.[13]

It may be observed in this connection that the liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt, is not altered by the discharge of such bankrupt.[14]

WHERE THE ENDORSER, SURETY, ETC., IS A PERSON OTHER THAN THE BANKRUPT.—A person who is secondarily liable for a debt of the bankrupt, as endorser or surety, has a provable claim against the estate, provided the principal creditor fails to prove his debt.[15]

[9] *In re* Blumer, 13 Fed. Rep. 623.

[10] *In re* Crawford, No. 3364 Fed. Cas., 5 N. B. R. 301.

[11] *In re* Pulsifer, 14 Fed. Rep. 247.

[12] *In re* Howard, No. 6750 Fed. Cas., 4 N. B. R. 571; *In re* Burchell, 4 Fed. Rep. 406.

[13] *In re* Matthews, 132 Fed. Rep 274, 13 Am. B. R. 91.

[14] B. A. 1898, Sec. 16.

[15] B. A. 1898, Sec. 57*i*.

The statute provides that "whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." [16] The surety has no provable claim until the creditor fails to prove.[17]

This provision is intended to protect the surety or endorser. The creditor may prove his debt under section 63 of the act, but he is not compelled to do so. He has the double security of the bankrupt's liability and that of the surety. He may prefer not to prove his debt against the bankrupt's estate, but rely wholly upon the endorser or surety. In such case, were it not for this provision, the surety clearly would be without protection, for it is evident that the debt to be proved by the surety is not the indebtedness of the bankrupt to him. He therefore would have no provable claim against his estate. This clause of the act, however, expressly gives him this right. If the creditor proves his debt, and receives his proportionate share of the bankrupt's estate with other creditors, the surety or endorser has no provable claim. For, were he also permitted to prove the debt, it would be to allow the same debt to be proved, in part at least, twice. Whatever the creditor receives in div-

See also Mace v. Wells, 7 How. 272, 12 L. Ed. 698; *In re* Hollister, 3 Fed. Rep. 452; Kyle & Gunter v. Bostick & Sherrod, 10 Ala. 589; Liscomb v. Grace, 26 Ark. 231; Liddell v. Wiswell, 59 Vt. 365; Post, Administrator, v. Losey et al., 111 Ind. 74; Fulwood v. Bushfield, 14 Penn. St. 90; Tubbs v. Williams, 9 N. C. 1; Morse v. Hovey, 7 N. Y. Chan. Rep. (1 Sandf.) 186; *In re* Ellerhorst, No. 4381 Fed. Cas., 5 N. B. R. 144.

[16] B. A. 1898, Sec. 57*i*. Compare R. S. Sec. 5070.

In re Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513; Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Insley v. Garside (C. C. A. 9th Cir.), 121 Fed. Rep. 699, 10 Am. B. R. 52; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[17] Phillips v. Dreher Co., 112 Fed. Rep. 404, 7 Am. B. R. 326.

idends diminishes *pro tanto* the surety's liability, and is equivalent to a payment made on his account and for his benefit.

Where the surety has paid a part of the debt to the creditor, such creditor may prove for the full amount owing by the bankrupt upon the obligation and after receiving in dividends satisfaction of the balance due him, will hold as trustee for the surety any dividends received by him in excess.[18] In case the creditor does not so receive the full amount of his debt the surety can not complain if called upon to pay the balance. Where the creditor has insisted upon the double liability he had secured, the surety has no right to intercept any sums which the creditor can collect from the bankrupt's estate, or to diminish the funds to which he has a right to look for satisfaction. It is only when the holder is fully satisfied that the surety can urge any claims to dividends payable on the original debt of the bankrupt.

Where a judgment recovered against a maker and payee of a note is satisfied by the payee, the latter's claim against the maker is provable under Sec. 57*i* and barred by discharge.[19]

In case the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor to the extent he shall have actually discharged it and no further. It is not necessary to make the claim provable that the surety has paid the debt for which he is liable.[20] He may prove his claim although he does not pay the note or other liability until after the commencement of proceedings in bankruptcy,[21] or although the

[18] Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re* Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651.

[19] Smith v. Wheeler, 55 N. Y. App. Div. 170.

[20] Mace v. Wells, 7 How. 272, 12 L. Ed. 698, 17 Vt. 503; Morse v. Hovey, 1 Sandf. Ch. (N. Y.) 186, 1 Barb. Ch. 404; Kyle v. Bostick, 10 Ala. 589; Tubbs v. Williams, 9 Ired. 1; Fulwood v. Bushfield, 14 Penn. 90.

Contra, Cake v. Lewis, 8 Penn. 493; McMullin v. Bank, 2 Penn. 343.

[21] Hardy v. Carter, 8 Humph. (Tenn.) 153; Tunno v. Bethune, 2 Dessau (S. C.) 285.

debt does not fall due until after the petition is filed.[22] A joint maker who takes up the note by giving his own individual note is entitled to prove his debt.[23] But an endorser or a surety is authorized to prove a debt in case only that the principal creditor could prove it and fails to do so.[24] He can not participate in the distribution of the estate until he has surrendered preferences received by the creditor.[25] He acquires no higher or better rights than the prior holder.

A creditor or a surety or endorser is entitled regularly to prove the whole debt against the estate of a bankrupt maker, irrespective of whether payments have been made by the surety to the creditor or not.[26] It is evident that the estate of the bankrupt is indebted to the creditor for the whole debt. This debt is not affected by dealings between the surety and the principal. It is immaterial whether the payment of this indebtedness is made to the creditor directly or to an endorser or surety who has been subrogated to the rights of the creditor by actual payments made by him.

Where Principal and Surety are both Bankrupts.—It is well settled that if a mortgage, pledge or other lien is given by a principal debtor to secure his endorser and other

[22] Crafts v. Mott, 5 Barb. (N. Y.) 305, affirmed in 4 N. Y. 606.

[23] *In re* Morrow, No. 9821 Fed. Cas., 2 Saw. 356.

[24] B. A. 1898, Sec. 57*i*; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513; Sigsby v. Willis, No. 12849 Fed. Cas., 3 Ben. 371; Ellis v. Ham, 28 Me. 385; Crafts v. Mott, 4 N. Y. 606.

[25] Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[26] Gorman v. Wright (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 14 Am. B. R. 135; *In re* Noyes Bros. (C. C. A. 1st Cir.), 127 Fed. Rep. 286, 11 Am. B. R. 506; *In re* Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651; *In re* Swift, 106 Fed. Rep. 65, 5 Am. B. R. 415; Swartz v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re* Ellerhorst, No. 4381 Fed. Cas., 5 N. B. R. 144; Downing v. Traders Bank, No. 4046 Fed. Cas., 2 Dill. 136; as explained *In re* Hollister, 3 Fed. Rep. 452; *Ex parte* Talcott, No. 13184 Fed. Cas., 9 B. R. 502.

surety, and both become bankrupts, the holders of the notes or other debts for which the surety is bound have an equity to apply the property to the discharge of their debts specifically.[27] A distinction has been sometimes taken between a security for the indemnity of the surety and one conditioned for the payment of the debt. But it seems well settled by the authorities that the creditor has an equitable claim to the security as well when a mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt.[28]

It is quite immaterial whether the surety has or has not actually paid the debt. If he has become absolutely bound for its payment, as was said by Lord Eldon,[29] "It is true these bills were not paid, but, inasmuch as the estate of the debtor could not be withdrawn until the debts were paid . . . and inasmuch as the estate of the creditor holding the security was in a condition that he was not able to make payment of the security and pay the bills. . . . The bill holder comes in, not on account of any special lien he has upon the property, but because the person from whom he holds has a security, which security cannot be taken away until all liability upon the bills is at an end."

Where a maker and an endorser whose liability is fixed are both adjudged bankrupts the whole debt, it seems, may be proved against either or both estates.[30] The reason is that each of them is liable for the full amount. The debt only can be collected once. If the estate of the endorser discharges a part of the debt it would seem that the trustee of the endorser might prove such claim against the estate of the maker.[31]

[27] *Ex parte* Morris, No. 9823 Fed. Cas., 2 Low. 424; Matthews v. Abbott, No. 9275 Fed. Cas., 2 Hask. 289.

[28] New Bedford Institution v. Fair Haven Bank, 9 Allen (Mass.) 178; approved in Matthews v. Abbott, No. 9275 Fed Cas., 2 Hask. 289.

[29] In *ex parte* Waring, 19 Ves. 345.

[30] Wollaston v. Porter, 122 Mass. 308.

[31] B. A. 1898, Sec. 57*m*. See Wollaston v. Porter, 122 Mass. 308.

§ 117. Interest.

In ascertaining the amount of a debt actually owing at the time the petition in bankruptcy is filed, the question of interest becomes important. Debts which are provable under the first clause of section 63 are allowable "with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

By this provision, interest which has accrued and would have been recoverable at the date of filing the petition is to be added to and become a part of the principal debt.[1] The interest which is to be so added is clearly that which could have been recovered under the state law,[2] or, in the absence of state law, under the laws of the United States.[3] Hence if the interest is usurious, so much of the debt and interest is provable as could be recovered under the local law.[4] It is obvious that interest which accrues subsequently is not a debt absolutely owing at the time of the filing of the petition in bankruptcy. Where a debt bearing interest at specified intervals, becomes due and payable before proceedings in bankruptcy are commenced, the creditor is entitled to prove for such interest, and also for interest from the date of maturity.[5]

Where the debt is payable at a future date the present value of the debt only is provable. If such debts bear interest all interest subsequent to the filing of the petition is re-

[1] Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832; *In re* Haake, No. 5883 Fed. Cas., 2 Saw. 231; *In re* Bartenbach, 1068 Fed. Cas., 11 N. B. R. 61; *In re* Orne, No. 10581 Fed. Cas., 1 Ben. 161.

[2] *In re* Prescott, No. 11389 Fed. Cas., 5 Biss. 523; *In re* Conrad, No. 3126 Fed. Cas., 6 A. M. Law Rev. 385; Providence County Sav. Bank v. Frost, No. 11453 Fed. Cas., 8 Ben. 293; *In re* Pittock, No. 11189 Fed. Cas., 2 Saw. 416; Nat. Exchange Bank v. Moore, No. 10041 Fed. Cas., 2 Bond 170.

[3] *In re* Wild, No. 17645 Fed. Cas., 11 Blatch. 243; Nat. Exchange Bank v. Moore, No. 10041 Fed. Cas., 2 Bond 170.

[4] See cases cited in last two notes above; *In re* Worth, 130 Fed. Rep. 927, 12 Am. B. R. 566.

[5] *In re* Bartenbach, No. 1068 Fed. Cas., 11 N. B. R. 61.

bated. Where such debts do not bear interest and are payable at a future date, the present value of the debt is ascertained by deducting from the amount of the debt the amount of interest on it, from the date of the filing of the petition until the time it becomes payable.[6] The remainder only is provable.

It is manifest that both classes of creditors, namely, those whose debt has matured and those whose debt is payable at a future date, are to be on an equal footing. The date of the filing of the petition is established as the time at which the liability is to be ascertained and determined. It may also be observed that where, as in most of the states of the Union, interest is regulated by law, and all the debts of the bankrupt bear the same or nearly the same rate of interest, it is immaterial to the creditor at what time the interest stops on his debts, provided interest on all the debts stops simultaneously with his own. For his proportionate share of the assets will be the same if the same period is fixed for the stoppage of interest on all the debts.

Preferred creditors, however, are entitled to interest upon their claims to the date of the actual payment.[7]

§ 118. Costs.

Where costs are incident to a judgment obtained prior to bankruptcy proceedings [1] it is regularly a provable debt under section 63. The reason for this is that it is a fixed liability evidenced by a judgment.

The former acts contained no provision for costs in pending cases, or where the judgment was obtained pending bankruptcy proceedings.[2] But the present act expressly provides that costs are provable in such cases. Among the debts of the bankrupt which may be proved and allowed against his

[6] *In re* Orne, No. 10581 Fed. Cas., 1 Ben. 361.

[7] *In re* Strachen, No. 13519 Fed. Cas., 3 Biss. 181.

[1] *Ex parte* O'Neil, No. 10527 Fed. Cas., 1 Low. 163; Graham v. Pierson, 6 Hill (N. Y.) 247.

[2] *In re* Fortune, No. 4955 Fed. Cas., 1 Low. 306; Sandford v. Sandford, 58 N. Y. 66.

estate are debts "due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice";[3] and debts "founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt."[4] Costs to be provable must fall within one of the provisions.[5]

Costs awarded against a trustee as substituted defendant in a suit pending in a state court have been ordered paid in full.[6]

§ 119. Debts founded upon contract.

Debts founded upon an open account, or upon a contract express or implied, are provable in bankruptcy.[1] They need not be evidenced by a writing, but may be founded upon an oral agreement.[2]

Under this clause debts arising upon open accounts or the usual contracts of bargain and sale, although for future delivery, are provable. Where a creditor proves for goods sold and delivered he is not entitled to damages sustained by fraudulent representations in making the contract,[3] or generally for speculative profits or damages.[4] Where a loss upon a policy of insurance has been duly and regularly adjusted in good faith before the company is adjudicated a bankrupt, the claim can be proved like any other debt arising upon a contract.[5] Where a bankrupt has received property

[3] B. A. 1898, Sec. 63, cl. 2.

[4] B. A. 1898, Sec. 63, cl. 3; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51.

But see *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

[5] *In re* Marcus, 104 Fed. Rep. 331, 5 Am. B. R. 19, affirmed (C. C. A. 1st Cir.) 105 Fed. Rep. 907, 5 Am. B. R. 365.

[6] *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

[1] B. A. 1898, Sec. 63, cl. 4.

[2] Capelle v. M. E. Church, No. 2392 Fed. Cas., 11 N. B. R. 536.

[3] *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184.

[4] *In re* Silverman Brothers, 101 Fed. Rep. 219, 4 Am. B. R. 83.

[5] *In re* Firemen's Ins. Co., No. 4796 Fed. Cas., 3 Biss. 462.

in trust, and has appropriated it in violation thereof, the debt thus created is provable.[6] So also a claim founded upon a covenant to repay a part of a premium, paid upon a policy of insurance upon the cancellation of the policy, is provable in the absence of provisions in the state laws, the charter or by-laws of the company which would make it void.[7]

A stockholder's statutory liability in an insolvent corporation,[8] or an unpaid subscription for stock in a corporation, may be proved against the estate of a bankrupt stockholder on the theory that it is a claim founded on an implied contract.

A claim arising *ex delicto* and also of such a character as to constitute a claim on the theory of a quasi contract is provable under Sec. 63, clause 4.[9] Such a claim is provable though the plaintiff elect to sue *ex delictu*.[10]

It has been held that a county may prove a claim for money due for the hire of convict labor.[11] A debt has been held

[6] *In re* Jordan, 2 Fed. Rep. 319; *In re* Upson, 123 Fed. Rep. 807, 10 Am. B. R. 602; *In re* Rundle, No. 12138 Fed. Cas., 2 N. B. R. 113; Ungewitter v. Von Sachs, No. 14343 Fed. Cas., 4 Ben. 167.

[7] *In re* Independent Ins. Co., No. 7019 Fed. Cas., 2 Low. 187.

[8] Dight v. Chapman, 44 Ore. 265; Longfuld v. Minnesota Sav. Bank, 95 Minn. 54, 14 Am. B. R. 413.

In re Rouse, 40 Law Bull. (Ohio) 220, the referee held that a stockholder's statutory liability in an insolvent Ohio corporation is not only a liability created by statute, but is also a claim founded upon an implied contract, and as such is a provable debt against the estate of the bankrupt stockholder, whenever the circumstances are such that a stockholder's liability suit would lie.

It is an unliquidated claim, and upon application to the court the court will direct the manner of its liquidation.

But the court will not proceed to direct the manner of liquidation unless application is made to it therefor.

In cases of stockholder's double liability the court may direct that a stockholder's liability suit be instituted by the creditor making the application, or that an already pending suit in the state court be maintained for the purpose of liquidating the claim; or, if the facts are simple and undisputed, may itself undertake to determine the amount provable as the bankrupt's stockholder's liability, and to whom the same is payable.

[9] Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; *In re* Filer, 125 Fed. Rep. 262, 5 Am. B. R. 835; *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

[10] Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659.

[11] *In re* Wright, 95 Fed. Rep. 807, 2 Am. B. R. 502, affirmed on

provable against the estate of a corporation in bankruptcy, where it was contracted by the company and amounted to more than one-half the sum of its available assets, but did not exceed one-half the amount of the stock paid up and actually issued to stockholders and held by them, where the articles of association limited the amount of indebtedness which it might contract to one-half the amount of the paid-up capital stock.[12] The value of an annuity based upon the expectancy of life, has been held to be a provable debt.[13] A claim for margins [14] or a claim for damages for conversion of collaterals in his possession,[15] against a bankrupt broker has been allowed. A claim for commissions for sales of goods has been allowed.[16]

It would seem as if a contingent debt founded in contract might be proved in case the contingency happened and a debt was thereby created, although the contingency happened pending bankruptcy proceedings.[17] Where the liability of an endorser becomes fixed after bankruptcy, but within the time limited for proving claims, he may prove under this clause, although he has not a provable claim under Sec. 63*a*, clause 1.[18]

Whether a claim for damages for breach of an executory

appeal *sub nom; In re* Worcester County, 102 Fed. Rep. 808, 4 Am. B. R. 496.

[12] Cunningham v. German Insurance Bank (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 4 Am. B. R. 363.

[13] Cobb v. Overman (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 6 Am. B. R. 324, overruling Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788. See also Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[14] *In re* Swift, 105 Fed. Rep. 493, 5 Am. B. R. 335; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744.

But see *In re* Knott, 109 Fed. Rep. 626, 6 Am. B. R. 749.

[15] *In re* Floyd, Crawford & Co., 15 Am. B. R. 277.

[16] *In re* Ladue, Tate Mfg. Co., 135 Fed. Rep. 910, 14 Am. B. R. 235. But see *In re* Silverman, 101 Fed. Rep. 219, 4 Am. B. R. 83.

[17] *In re* Gerson (C. C. A. 2d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923. See Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[18] *In re* Gerson (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11.

contract is provable depends upon its status at the time the petition in bankruptcy is filed.[19] The doctrine that a suit may be maintained to recover damages under the entire contract, when there is an anticipatory breach of an executory contract by an absolute refusal to perform it is well settled.[20] If at the time the petition in bankruptcy is filed the liability of the bankrupt is so fixed that the proving creditor could maintain such a suit he has a provable claim. Where, prior to bankruptcy, the bankrupt has destroyed the subject-matter of the contract or disabled himself so as to make performance impossible, his conduct is deemed equivalent to a breach of the contract, although the time for performance had not arrived and the other party to the contract may prove a claim for damages for breach of the contract.[21] It has been held that bankruptcy is the equivalent of disenablement and repudiation and that a claim for damages is provable although there was no breach of the contract prior to filing the petition.[22] The better rule is that where there was no breach of an executory contract prior to bankruptcy, that the filing of an involuntary petition does not operate as a repudiation of the contract. Many courts have applied this rule in holding that a vendor will not be permitted to prove damages under a contract for the sale of annual crops to be raised in successive years,[23] or a landlord to prove for future installments of rent under a

[19] *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223.

[20] Roehm v. Horst, 178 U. S. 1, 44 L. Ed. 953, and cases collected in the opinion.

[21] *In re* Stern (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 8 Am. B. R. 569; *In re* Grant Shoe Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 12 Am. B. R. 349; *In re* Saxton Furnace Co., 142 Fed. Rep. 293, 15 Am. B. R. 445; *In re* Silverman Bros., 101 Fed. Rep. 219, 4 Am. B. R. 83.

As to the right of a surety on a contractor's bond to prove, see Wood v. Guaranty Co., 143 Fed. Rep. 424, 16 Am. B. R. 21.

[22] *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 375.

But see *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110.

[23] *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110.

lease,[24] or an employe to prove a claim for damages for breach of contract of employment.[25] If the damages at the time of bankruptcy are so far contingent that they cannot be computed by any process known to the law, the claim is not provable.[26]

An annual corporation fee required by state law solely as a condition of its continued existence without regard to the value of its property and franchises is not provable as a debt upon contract express or implied.[27]

It has been held that salary of an officer of a bankrupt corporation is not provable, unless, prior to the services, the compensation was fixed by by-law or a resolution of the directors duly entered on the minutes of the board.[28]

A contract by a husband to pay a wife a certain sum at stated periods during her life or widowhood,[29] or for the support of his minor children is not provable against his estate in bankruptcy.[30]

Where an administrator commits a breach of his bond and dies before the bankruptcy of the surety, a claim for damages is provable against the estate of the surety.[31] But if the breach is committed after the bankruptcy of the surety, no provable claim exists.[32]

[24] Watson v. Merrill (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 14 Am. B. R. 453; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313; *In re* Curtis, 109 La. Ann. 171, 9 Am. B. R. 286.

[25] *In re* Sweetser, Pembroke & Co. (C. C. A. 2d Cir.), 142 Fed. Rep. 131, 15 Am. B. R. 650.

In re Silverman Bros., 101 Fed. Rep. 219, 4 Am. B. R. 83, the breach occurred before bankruptcy and the employe was allowed to prove balance of salary.

[26] As to Contingent Claims see Sec. 112, *ante*.

[27] *In re* Danville Rolling Mill Co., 121 Fed. Rep. 432, 10 Am. B. R. 327.

As to such fees being a tax entitled to priority, see New Jersey v. Anderson 203 U. S. ——.

[28] *In re* Grubbs-Wiley Grocery Co., 96 Fed. Rep. 183, 2 Am. B. R. 442.

[29] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[30] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

[31] Harmon v. McDonald, 187 Mass. 578.

[32] Loring v. Kendall, 1 Gray (Mass. 305.

A debt is not provable when founded upon an illegal consideration,[33] as where money is loaned a debtor for the purpose of committing an act of bankruptcy,[34] or where an overdraft has been made by a collusion with the cashier.[35]

Where the claim for damages for breach of a contract is unliquidated it may be liquidated under the provisions of Sec. 63*b*.[36]

§ 120. Rent.

Rent due by the bankrupt is regularly provable in bankruptcy. Under the act of 1867 rents ceased at the time of the bankruptcy.[1]

Under the present act there is no such provision. The courts have uniformly permitted to be proved against the estate of the bankrupt lessee rent due prior to the adjudication,[2] and rent for the occupation and use of leased premises after bankruptcy where such premises were actually used by a receiver or trustee.[3] Where bankruptcy occurs between rent days it may be doubted if the landlord can prove rent beyond the last rent day. The general rule is, that rent cannot be apportioned as to time.[4]

A contract of lease is not *ipso facto* terminated by the bankruptcy of the lessee.[5] Whether rent under a lease accruing

[33] Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207.

[34] *In re* Hatje, No. 6215, Fed. Cas., s. c. 6 Biss. 436.

[35] *In re* Eureka Ins. Co., No. 4550, Fed. Cas., 1 Low. 500.

[36] *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728.

[1] R. S. Sec. 5017.

[2] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246.

[3] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

[4] Hoagland v. Crum, 113 Ill. 365; Zule v. Zule, 24 Wend. (N. Y.) 74; The Mayor v. Ketchum, 67 How. Prac., N. Y. 161; Perry v. Aldrich, 13 N. H. 343; Randall v. Rich, 11 Mass. 494.

[5] *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson Consol. Store Service Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313; Watson v. Merrill (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 14 Am. B. R. 453.

But see *In re* Jefferson, 93 Fed.

after bankruptcy may be proved against the tenant's estate in bankruptcy depends upon the terms of the lease, and the election of the trustee to take or reject the contract of lease.

It is entirely competent to contract that the consequences of a default of rent for the use of property, or the bankruptcy of the lessee, shall be the precipitancy of the maturity of future installments for the rental of the property in respect to which default has been made.[6] Such terms in a lease make future rent provable. But the trustee may reject the contract of lease and render such claim not provable.

In the opinions of the referees and of the judges there is a marked unanimity to the extent that rent to accrue in the future is not a provable debt under the leases which have been considered.[7] There is a great diversity of view as to the ground on which this ruling is placed.[8] Where by the terms of the lease future installments of rent are made immediately due and payable, the landlord may, acting under another clause of the lease, terminate it by re-entry,[9] or by accepting a surrender of a part of the lease,[10] and thereafter be estopped from proving for future rents after bankruptcy.

Rep. 948, 2 Am. B. R. 206; *In re* Hays, Foster & Ward Co., 117 Fed. Rep. 879, 9 Am. B. R. 144; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788.

[6] Lamson Consol. Store Service Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; Platt v. Johnson, 168 Pa. 47.

[7] Watson v. Merrill (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 14 Am. B. R. 453, and cases cited in the opinion.

[8] *In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; *In re* Hays, Foster & Ward Co., 117 Fed. Rep. 879, 9 Am. B. R. 144; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; Wilson v. Penn Trust Co., 114 Fed. Rep. 742, 8 Am. B. R. 169; Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 965, 5 Am. B. R. 313; Lamson Consol. Store Service Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335.

[9] *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson Consol. Store Service Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564.

[10] Wilson v. Penn. Trust Co., 114 Fed. Rep. 742, 8 Am. B. R. 169; *In re* Winfield Mfg. Co., 137 Fed. Rep. 984, s. c. 140 Fed. Rep. 185. But see Evans v. Lincoln Co., 204 Pa. St. 448, 10 Am. B. R. 401.

It has been held that a tenant could not prove for damages for a breach of covenant for quiet enjoyment of premises under a lease to begin after the date of bankruptcy,[11] or a landlord for breach of a covenant that the lessee should be liable for loss and damage sustained by the lessor on account of the premises remaining unleased or relet for less rent after the termination of the lease by re-entry.[12] The landlord cannot prove for damages occasioned by restoring alterations made by the lessee when in possession.[13] Where a landlord claims full rental under his lease, it may be shown that he agreed to reduce the rent, had accepted several installments at the reduced rates, and had been moved to make the reductions by considerations advantageous to himself, his claim for rent against the tenant's estate in bankruptcy must be reduced by the amount received from reletting the premises.[14]

The trustee in bankruptcy may elect to take the lease as an asset of the bankrupt tenant's estate. In such case the lease is regularly sold subject to the future payments of rent stipulated in it. The trustee and the estate are not liable thereafter for rent. The purchase price becomes an asset of the estate, subject to the payment of any accrued rent secured by a lien reserved in the lease.

If the trustee elects to reject the contract of lease, as he has a right to do, it is a nullity so far as the bankruptcy proceedings are concerned. In such cases future rent, although made due and payable at once by the terms of the lease, is not a provable debt. The landlord may prove for rent due prior to bankruptcy for the use and occupation of the premises either as "a fixed liability due and owing" or as a "debt arising in contract." For the same reason he may prove for subsequent use and occupancy of the premises by the trustee or receiver.[15]

[11] *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490.

[12] *In re* Shaffer, 124 Fed. Rep. 111, 10 Am. B. R. 633; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564.

[13] *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246.

[14] Evans v. Lincoln Co., 204 Pa. St. 448, 10 Am. B. R. 401.

[15] *In re* Hinckel Brewing Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

Where the state law entitles the landlord to a lien upon the goods of his tenant for rent the court of bankruptcy will enforce such lien as against the proceeds of such goods when sold by the trustee.[16]

§ 121. Mutual debts and credits.

The present bankrupt statute provides that "In all cases of mutual debts or mutual credits between the estate of a bankrupt and the creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months after such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." [1]

Similar provisions are contained in the former United States bankrupt acts and in the English acts.[2] The opinions

[16] *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324; Wilson v. Penn. Trust Co. (C. C. A. 3d Cir.), 114 Fed. Rep. 742, 8 Am. B. R. 169.

[1] B. A. 1898, Sec. 68.

[2] Act of 1867: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition."—R. S. Sec. 5073; Act of March 2, 1867, 14 Stat. at L. 526, Sec. 20.

Act of 1841: "In all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off."—Act of August 19, 1841, 5 Stat. at L. 445, Sec. 5.

Act of 1800: "*And be it further enacted,* That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt, and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set-off, and no more, shall be

of the courts construing these provisions are valuable in determining the true meaning of the present section.

The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter is given by the statutes of set-off and counterclaim to prevent cross actions. But under the bankupt statutes the mutual credit clause has not been so construed. The object of this clause is not to avoid cross actions, for none would lie against trustees in bankruptcy, and one against the bankrupt would be unavailing, but to do substantial justice between the parties where a debt is really due from the bankrupt to a debtor to his estate.[3]

It may be doubted whether this mutual credit clause applies except between a creditor and trustee.[4]

§ 122. What are "mutual debts" and "mutual credits."

The words "mutual debts" and "mutual credits" appear in all of the bankrupt acts. The word "debt" includes any debt, demand or claim provable in bankruptcy in the present act.[1]

claimed or paid on either side respectively."—Act of April 4, 1800, 2 Stat. at L. 33, Sec. 42.

English Act of 1883: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."—46 and 47 Vic., Chap. 52, Sec. 38. This is in substance a re-enactment of the prior English statutes, beginning with the temporary act of IV and V Anne, Chap. 17. Each act differs slightly from the others.

[3] Forster v. Wilson, 12 M. & W. 203.

[4] Consult New Quebrada Co. v. Carr, 4 L. R. C. P. 651; Turner v. Thomas, 6 L. R. C. P. 610; *In re* Fort Wayne Electric Corp., 95 Fed. Rep. 264, 2 Am. B. R. 503.

[1] B. A. 1898, Sec. 1, clause 11.

Prior to the leading case of *Rose* v. *Hart*,[2] decided in 1818, the words "mutual credit" generally received a very wide interpretation, much more extensive than the words "mutual debt."[3] In that case this phrase was defined in the following words: "Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shows that the legislature meant such *credits* only as must in their nature terminate in *debts*, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."[4] The rule established in this case as to the nature of the credits which can be subject of set-off has been declared in other cases.[5]

In the case of *Libby* v. *Hopkins*,[6] speaking of the act of 1867, which is almost identical with the present statute in this respect, the supreme court said: "In our act the terms

[2] 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part 1, 308, where the doctrine of set-off in bankruptcy is considered at length and the English and American cases on the subject collated and reviewed in a note at the end of the opinion.

[3] *Ex parte* Deeze, 1 Atk. 228; Murray v. Riggs, 15 John. (N. Y.) 571.

[4] Rose v. Hart, 8 Taunt. 506, s. c. 2 Smith's Leading cases, Part I, 308, and note.

[5] Libby v. Hopkins, 104 U. S. 307, 26 L. Ed. 769; *In re* Caylus, No. 2534 Fed. Cas., 1 Low. 550; Catlin v. Foster, No. 2519 Fed. Cas., 1 Saw. 37; Easum v. Cato, 5 B. & Ald. 861; Young v. Bank, 1 Moore, P. C. 150; Palmer v. Day (1895), 2 Q. B. 618; Smith v. Hodson, 4 T. R. 212; Goodrich v. Dobson, 43 Conn. 576.

'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of this section or its contents for extending the terms so as to include trusts." Having in mind the definition of debts as used in the bankrupt law, this language would not seem to limit the rule laid down in *Rose* v. *Hart.*[7] But "mutual debts" and "mutual credits" would include debts, demands or claims provable in bankruptcy which must in their nature terminate in debts. In *Rose* v. *Hart,* the word "debt" is evidently used with its technical legal meaning.

A claim for unliquidated damages provable under the act can not be set off against the debt of a creditor or a bankrupt until it has been put into the shape of a debt.[8]

In order that a debt or credit may be set off it is necessary that four things concur. *First.* The debts or credits must be mutual. *Second.* They must be in the same right. *Third.* They must be debts or credits provable in bankruptcy. *Fourth.* They must be debts or credits which were not purchased by or transferred to the debtor of the bankrupt after the filing of the petition, or within four months before such filing for the purpose of setting them off, and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. If any one of these elements is wanting, the debt or credit can not be used as a set-off. These elements will be considered separately.

§ 123. What mutuality is necessary.

The debts and credits which are to be set off one against the other must be mutual.[1] In order to constitute that

[6] 104 U. S. 309, 26 L. Ed. 769.

[7] 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part 1, 308.

[8] *In re* Orne, No. 10581 Fed. Cas., s. c. 1 Ben. 361; Brown v. Cuming, 2 Caines (N. Y.) 33; Booth v. Hutchinson, 15 L. R. Eq. 30; Palmer v. Day, 2 Q. B. 618.

[1] Libby v. Hopkins, 104 U. S. 307, 26 L. Ed. 769; Gray v. Rollo, 18 Wall. 632, 21 L. Ed. 927; Sawyer v. Hoag, 17 Wall. 622, 21 L.

mutuality of debts or credits which is required by the statute it is necessary that the debt or credit which is set off, and the debt or credit against which it is set off, should be between the same parties. Thus ordinarily a joint debt can not be set off against a separate debt, nor a separate debt against a joint debt, nor debt due from three persons against a debt due to two of them, or the like.[2] Where the joint debt may be collected from the property of either of the joint debtors, and is provable in bankruptcy against the estate of him who has been adjudged a bankrupt, it may be set off against any claim which the bankrupt has against the creditor.[3] A debt of one of two partners to the other partner may be set off against a balance in his hands arising upon the settlement of the partnership accounts.[4]

The question whether a debt payable *in futuro* could be set off against a debt payable *in præsenti* was one of the earliest which arose under the English bankrupt act. It was decided in the affirmative on the ground that, though there might not be debts mutually payable between the parties, there were mutual credits, and that the case came within the equity of the statute.[5] The same question has received a similar answer in the United States in cases arising under the former bankrupt acts.[6]

Ed. 731; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Wilson v. Nat. Bank, 3 Fed. Rep. 391.

[2] *In re* Shults, 132 Fed. Rep. 573, 13 Am. B. R. 84; Gray v. Rollo, 18 Wall. 629, 21 L. Ed. 927; Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Clark v. Sparhawk, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115; *In re* Crystal Spring Bottling Co., 100 Fed. Rep. 265, 4 Am. B. R. 55, 3 N. B. N. 179; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223.

Ex parte Twogood, 11 Ves. 517; *Ex parte* Ross, Buck, 125; Staniforth v. Fellows, 1 Marsh, 184.

[3] Tucker v. Oxley, 5 Cranch 34, 3 L. Ed. 29, as explained in Gray v. Rollo, 18 Wall. 633, 21 L. Ed. 927; Cosgrove v. Cosby, 86 Ind. 511.

[4] *In re* Voetter, 4 Fed. Rep. 632; Clark v. Sparhawk, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115.

[5] *Ex parte* Prescott, 1 Atk. 230; Alsagar v. Curric, 12 M. & W. 751; *Ex parte* Wagstaff, 13 Ves. 65; Sheldon v. Rothschild, 8 Taunt. 156; Atkinson v. Elliott, 7 T. R. 378.

[6] Marks v. Barker, No. 9096 Fed. Cas., 1 Wash. C. C. 178; Catlin v. Foster, No. 2519 Fed. Cas., s. c. 1 Saw. 37; Fort v. McCully, 59 Barb. (N. Y.) 87; *In re* City Bank,

In order to render debts and credits mutual, it is not necessary that the creditor and bankrupt should have had any intention to create cross demands.[7]

It is not necessary that the demands should be of the same nature. They may be different in their nature. Thus, one may be founded on deed and the other on simple contract. A loss upon a policy of insurance may set off against an indebtedness for money borrowed from an insurance company,[8] or for money deposited with the holder as a banker.[9] A person may set off a credit on deposit in a bankrupt bank against his indebtedness on notes or as the endorser upon a note held by the bank which has been protested.[10] A check issued by a bankrupt may be set off against a note due the bankrupt's estate.[11] A bank may set off a regular bank balance

No. 2742 Fed. Cas., 6 N. B. R. 71; Drake v. Rollo, No. 4066 Fed. Cas., 3 Biss. 273.

[7] Hankey v. Smith, 3 T. R. 507; Edmeads v. Newman, 1 B. & C. 418.

But see observation of Mr. Justice Bradley in Gray v. Rollo, 18 Wall. 632, 21 L. Ed. 927. He said: "Nor does the case present on of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any reference to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the bankrupt law."

[8] Scammon v. Kimball, 92 U. S. 362, 23 L. Ed. 483; Drake v. Rollo, No. 4066 Fed. Cas., 3 Biss. 273; Commonwealth v. Shoe Insurance Co., 112 Mass. 131.

[9] *In re* Fornsworth, No. 4673 Fed. Cas., 5 Biss. 223; Scammon v. Kimball, No. 12435 Fed. Cas., 5 Biss. 431; *In re* Petrie, No. 11040 Fed. Cas., 5 Ben. 110; Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42.

[10] *In re* Shults, 132 Fed. Rep. 573, 13 Am. B. R. 84; Marks v. Barker, No. 9096 Fed. Cas., 1 Wash. C. C. 178; Winslow v. Bliss, 3 Lans. (N. Y.) 220; *In re* Meyers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Henry L. Meyer, 5 Am. B. R. 593, 106 Fed. Rep. 828. But see Henry L. Meyer, 107 Fed. Rep. 86, 5 Am. B. R. 596.

[11] Ogden v. Cowley, 2 Johns. (N. Y.) 274.

against a note of a bankrupt held by it,[12] or against a note on which the bankrupt was an endorser.[13] Where a bank transfers all its assets to another bank which agrees to pay all the liabilities of its assignor, the right of set-off existing in the assignor's bank inures to the benefit of the assignee bank.[14]

Where bills, money or chattels are deposited with the creditor for a specific purpose, he can not claim to set off a debt owing to him from the bankrupt against the trustee claiming such bills or goods.[15] Such a case exists where goods are deposited with a bailee for the purpose of having work done upon them,[16] or where money is deposited for a specific purpose.[17] So where a trustee seeks to set aside a preference the defendant can not set off notes of the bankrupt.[18] But if a mutual debt or credit within the meaning of this section is once established a temporary suspension of it has been held not to destroy the right to set off where the mutual debt or credit afterwards revives.[19]

Where there is a debt on one side and on the other a delivery of property with power to turn it into money, he may turn it into money and the two debts may be set off one against the other. The test is whether the credit given by the delivery of the property must in its nature terminate in a debt. Thus a creditor, who at the time of the bankruptcy

[12] N. Y. County Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42; *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 12 Am. B. R. 221; *In re* Scherzer, 130 Fed. Rep. 631, 12 Am. B. R. 451.

[13] *In re* Philip Semmer Glass Co. (C .C. A. 2d Cir), 135 Fed. Rep. 77, 14 Am. B. R. 25.

[14] Frank v. Mercantile National Bank, 100 Sup. Ct. (N. Y.) Appellate Div. 449.

[15] Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 721; Rose v. Hart, 8 Taunt. 499; Jenkins v. Armour, No. 7260 Fed. Cas., 6 Biss. 312; Goodrich v. Dobson, 43 Conn. 576; *In re* Lane, No. 8043 Fed. Cas., 2 Low. 305.

[16] Rose v. Hart, 8 Taunt. 499.

[17] Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769.

[18] Fleming v. Andrews, 3 Fed. Rep. 632.

[19] Collins v. Jones, 10 B. & C. 777; Boland v. Nash, 8 B. & C. 105.

has in his hands goods or chattels of the bankrupt with a power of sale or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him, and this although the power to sell or collect were revocable by the bankrupt before his bankruptcy.[20]

§ 124. The debts and credits must be in the same right.

In order that debts and credits may be set off they must be due respectively in the same right.[1] This rule is subject to a few exceptions to be mentioned presently. It is evident that there is a distinction between debts being mutual and debts being held in the same right. Debts may be mutual and held in different rights.

Thus it has been held that a debt due to an executor, as executor, can not be set off against a debt due from him in his own right.[2] But where a person as executor and residuary legatee had a balance in the hands of bankers he has been allowed to set off, in an action by the trustee of the bankers for a debt due from him to them, the balance due him as executor and residuary legatee, it appearing that he had in his hands more than sufficient assets to pay all the testator's debts and legacies remaining unpaid.[3] It has also been held that a debt due for stock in a corporation could not be set off against a debt due from the corporation.[4] The

[20] *Ex parte* Whiting, No. 17573, Fed. Cas., 2 Low. 572; Rose v. Hart, 8 Taunt. 506, 2 Smith Leading Cases, Part 1, 330, and notes thereto; Goodrich v. Dobson, 43 Conn. 576; *In re* McVay, 13 Fed. Rep. 443.

But see Brown v. New Bedford Savings Inst., 137 Mass. 262.

[1] Sawyer v. Hoag, 17 Wall. 622, 21 L. Ed. 731; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Wright v. Rogers, No. 18090 Fed. Cas., 3 McLean, 229; West v. Pryce, 2 Bing. 455.

[2] Bishop v. Church, 3 Atk. 691.

[3] Bailey v. Finch, 7 L. R. Q. B. 34. See observations on this case in *Ex parte* Morier, 12 Chan. Div. 491.

[4] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Scammon v. Kimble, 92 U. S. 362, 23 L. Ed. 483; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Morgan County v. Allen, 103 U. S. 498, 26 L. Ed. 498; *In re* Wiener & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

reason for this is, that the debt which the appellant owed for his stock is a trust fund held by the corporation, for the benefit of all creditors of the company, and, therefore, not in the same right as a debt between the company and the debtor. Where a creditor of a bankrupt knowing him to be in failing circumstances agrees to open a new account irrespective of the old indebtedness he can not set off the amount due by him on the new account against the amount due to him on the old account.[5] Where an agreement between a bankrupt and another person obligates the latter to pay laborers after deducting from the payrolls amounts furnished laborers by the bankrupt for supplies and to remit to the bankrupt the amount of such deductions irrespective of the account between him and the bankrupt is not a case of mutual credits and debts because as to such deductions such persons stood toward the bankrupt in the relation of a trustee.[6]

A judgment for a penalty incurred by the violation of a statute against usury is not a proper set-off against a claim of the judgment debtor against the bankrupt's estate.[7] It has also been held that a debt owing to a wife when sole can not be set off against a debt from her husband,[8] or a debt owing by the bankrupt's wife before marriage against a debt owing to him [9] unless after marriage he makes the wife's debt his own.[10] A debt due to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate can not be set off against a debt due from or to the bankrupt before the bankruptcy.[11]

For the same reasons the separate debt of one partner can not be set off against a partnership debt or *vice versa*.[12] But

[5] *In re* Troy Woolen Co., No. 14203 Fed. Cas., 8 N. B. R. 412.

[6] Western Tie & T. Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

[7] Wilson v. National Bank of Rolla, 3 Fed. Rep. 391.

[8] *Ex parte* Blagden, 19 Ves. 465.

[9] Yates v. Sherrington, 11 M. & W. 42; s. c. 12 M. & W. 855.

[10] Wood v. Akers, 2 Esp. 594.

[11] Alloway v. Steere, 10 Q. B. D. 22; West v. Pryce, 2 Bing. 455.

[12] Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Gray v. Rollo, 18 Wall. 629, 21 L. Ed. 927; Clark v. Sparhawk, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115; *Ex parte* Twogood, 11 Ves. 517; Lanesborough v. Jones, 1 P. W.

the rule excluding a set-off as between joint and separate debts does not apply to a surviving partner, as the right to sue for partnership debts survives to him alone.[13] Neither does it apply where the joint debt is in fact a security for the separate debt, as where one partner joins in a bond merely as surety for another.[14] In such case the debt on the joint security is in reality the debt of the principal debtor only, who may set off a debt owing to him by the obligee. It has been thought that the mutual credit clause does not apply to partnership debts unless all the members of the firm are bankrupt; for it was intended to operate only in respect of demands by and against bankrupts. Hence it would not apply if there was a solvent partner.[15] If it should be held to apply in such cases, it is manifest that it would not release the liability of the solvent partner.[16]

There are a few exceptions to the general rule. Thus, in the case of a factor selling goods as his own without disclosing his principal the debtor may set off against the principal any debt which he could have set off against the factor.[17] So also it seems that by special agreement debts in separate rights may be set off, one against the other.[18]

§ 125. Set-offs must be provable debts.

The statute expressly provides that a set-off, or counterclaim, in favor of any debtor of the bankrupt must be provable against the estate.[1] It would seem that any debt provable in bankruptcy might be set off against any mutual debt held in

326; *Ex parte* Ross, Buck, 125; Abbott v. Hicks, 5 Bing., N. C. 578.

[13] Tucker v. Osley, 5 Cranch, 34, 3 L. Ed. 29; as explained in Gray v. Rollo, 18 Wall. 633, 21 L. Ed. 927; Cosgrove v. Crosby, 86 Ind. 511; French v. Andrade, 6 T. R. 582; Slipper v. Stidstone, 5 T. R. 493.

[14] *Ex parte* Hanson, 12 Ves. 346; s. c. 18 Ves. 232; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

[15] See Vulliany v. Noble, 3 Mer. 621; *Ex parte* Stephens, 11 Ves. 24.

[16] B. A. 1898, Sec. 16.

[17] George v. Clagett, 7 T. R. 359.

[18] Cuxon v. Chadley, 1 C. & P. 174.

[1] B. A. 1898, Sec. 68*b*; Morgan v. Wordell, 178 Mass. 350, 3 N. B. N. 513.

the same right, provided it was not purchased for this purpose within the time limited in the act. What constitutes a provable debt is the subject of this chapter, and does not require further explanation at this point.

It was held formerly that the liability of an endorser or surety could not be made a subject of set-off unless he had actually paid the debt.[2] Where, under Section 57*i*, such claim is provable it would seem that it may be set off against any claim of the principal debtor against the surety to the extent that the endorser or surety can prove his claim. So also costs provable under the act may be the subject of set-off.[3] Under the former acts untaxed costs were not provable, and, therefore, could not be used as set-offs, but under the present act they are provable, and consequently can be the subject of set-off.[4]

If the claim of a creditor, who is also a debtor, of the estate is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim in an action by the trustee to recover his indebtedness to the estate as a claim "provable against the estate" within the meaning of Section 68*b*.[5]

§ 126. Debts acquired by purchase as set-offs.

There is nothing unlawful in purchasing a debt, though it be for the purpose of using it as a set-off.[1] Such debts may be the subject of set-off, provided they were not purchased by or transferred to such person after the filing of the petition, or

[2] Abbott v. Hicks, 5 Bing., N. C. 578.

[3] See Staniforth v. Fellowes, 1 Marsh, 184; Thomason v. Frere, 10 East, 418.

But see Robarts v. Brèe, 8 Cha. Div. 198.

[4] See costs, Sec. 118, *ante*.

[5] Norfolk & W. Ry. Co. v. Graham (C. C. A. 4th Cir.), 145 Fed. Rep. 809, 16 Am. B. R. 610.

[1] Mattocks v. Lovering, 3 Fed. Rep. 212; Lloyd v. Turner, No. 8436 Fed. Cas., 5 Saw. 463; Hovey v. Home Insurance Co., No. 6743 Fed. Cas., 10 N. B. R. 224; Humphreys v. Blight, No. 6870 Fed. Cas., 4 Dall. 370; *In re* City Bank, No. 2742 Fed. Cas., 6 N. B. R. 71.

within four months before such filing, with a view to such use, and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.[2] A claim purchased after insolvency and within the prohibited period by a debtor of the bankrupt can not be used as a set-off.[3] A person who has, within four months of bankruptcy and with knowledge of the insolvency of the bankrupt, acquired claims of the bankrupt against laborers, can not use these claims by way of set-off against a debt due from such person to the bankrupt.[4]

It would therefore seem that a claim or debt purchased more than four months prior to the filing of the petition may be used as a set-off, irrespective of whether the person purchasing or receiving it had knowledge or notice that the bankrupt was insolvent or not.[5]

In computing the four months the first day is excluded and the last day included unless the last day falls on a Sunday or holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.[6] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving.[7]

[2] B. A. 1898, Sec. 68*b*. Compare R. S. Sec. 5073; McIver v. Wilson, No. 8833, Fed. Cas., 1 Cranch C. C. 423; Smith v. Brinkerhoff, 2 Selden (N. Y.) 305.

[3] *In re* Shults, 132 Fed. Rep. 582, 13 Am. B. R. 84; *In re* Shults, 135 Fed. Rep. 623, 14 Am. B. R. 378.

[4] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447, reversing (C. C. A. 8th Cir.), 129 Fed. Rep. 728, 12 Am. B. R. 111.

[5] Mattocks v. Lovering, 3 Fed. Rep. 212; Lloyd v. Turner, No. 8436 Fed. Cas., 5 Saw. 463; Hovey v. Home Insurance Co., No. 6743 Fed. Cas., 10 N. B. R. 224; Humphreys v. Blight, No. 6870 Fed. Cas., 4 Dall. 370. But see Hitchcock v. Rollo, No. 6535 Fed. Cas., 3 Biss. 276; Rollins v. Twitchell, No. 12027 Fed. Cas., 2 Hask. 66; Smith v. Hill, 8 Gray 572.

[6] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; *In re* Lang, No. 8056 Fed. Cas., s. c. 2 N. B. R. 480.

[7] B. A. 1898, Sec. 1, clause 14.

§ 127. Rights of preferred creditors to set-offs.

Under the mutual credit clause[1] a creditor having a preference can not set off an individual debt in a suit by the trustee to set aside such preference. The reason is, that the debts are not mutual nor in the same right. The preference which is being avoided is a debt between the preferred creditor and the general creditors—not the bankrupt. The individual debt is between the preferred creditor and the bankrupt. The trustee holds one of the debts as the representative of the general creditors and the other as the representative of the bankrupt.

But the act expressly provides for set-offs in such cases, as follows: "If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."[2]

Prior to the amendment of 1903 there was a conflict in the opinions of the different courts as to the construction of this provision in connection with Section 57*g*.[3] The controversy turned upon the meaning of the word "recoverable." It is clear that only preferences voidable under Section 60*b* need now be surrendered before having a claim allowed.[4] A creditor, who after receiving a preference from a debtor extends him credit in good faith without security and the money or property actually passes into the debtor's possession, is entitled to have the amount of such credit set off from the amount recoverable by the trustee.[5] It is immaterial what the debtor does with the money or property after it comes into his possession.[5]

[1] B. A. 1898, Sec. 68.

[2] B. A. 1898, Sec. 60; Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862.

[3] *In re* Topliff, 114 Fed. Rep. 323, 8 Am. B. R. 141, where the cases are collated.

[4] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

[5] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862; *In re* Morrow & Co., 134 Fed. Rep. 686, 13 Am. B. R. 392.

§ 127a. Waiver of set-off.

If a claim for set-off, or counterclaim, is not set up at the time of proving the claim in bankruptcy it will be deemed as waived. It has been held that the creditor could not maintain a suit upon such a debt thereafter.[1]

§ 128. Torts.

Under the former bankruptcy acts unliquidated damages for torts, such as assault, slander, deceit or personal injury, were not provable in bankruptcy.[1] Where damages for torts had been liquidated and reduced to judgment prior to bankruptcy, such judgments were provable as debts under former bankrupts acts.[2]

The same rule has been adopted in construing the act of 1898. It is well settled that an unliquidated claim for damages *ex delicto* is not provable.[3] The courts have generally allowed judgments for torts to be proved as "a fixed liability, as evidenced by a judgment" where the judgment was obtained prior to bankruptcy.[4]

A distinction exists in case a demand may arise upon contract or in tort, as in actions for negligence against carriers, or in actions against bailees to recover the pledge after the determination of the bailment, which may be either in trover or assumpsit. It is now well settled that where a claim arises *ex delicto,* but is also of such a character as to constitute a claim on the theory of a quasi contract, the debt is provable in bankruptcy under section 63, clause 4.[5] The

[1] Brown v. Farmers' Bank, 6 Bush. (Ky.) 198; Russell v. Owens, 61 Mo. 185. See also *In re* State Ins. Co., 16 Fed. Rep. 756.

[1] Zimmer v. Schleehauf, 115 Mass. 52; *In re* Hennocksburgh, No. 6367 Fed. Cas., 6 Ben. 150; *In re* Schuchardt, No. 12483 Fed. Cas., 8 Ben. 585.

[2] *In re* Comstock, No. 3073 Fed. Cas., 22 Vt. 642; *In re* Book, No. 1637 Fed. Cas., 3 McLean, 317; *In re* Hennocksburgh, No. 6367 Fed. Cas., 6 Ben. 150.

[3] *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425; *In re* Brinckman, 103 Fed. Rep. 65, 4 Am. B. R. 551; Beers v. Hanlin, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Heinsfurter, 97 Fed. Rep. 198, 3 Am. B. R. 113; *In re* United Button Co., 140 Fed. Rep. 495, 15 Am. B. R. 390.

[4] See observation of Judge Bradford *In re* United Button Co., 140 Fed. Rep. 495, 15 Am. B. R. 390, 406.

[5] Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B.

right to prove such claims is not waived by suing to recover damages for the torts.[6]

CLAIMS FOR INFRINGEMENT OF PATENTS.—The infringement of a patent sounds in tort and not in contract. The only remedies provided by Congress, which has, under the constitution, exclusive control of the subject, are a suit in equity and trespass on the case. Assumpsit will not lie. There is no implied contractional relations between an infringer and the owner of a patent right. The infringer is a tort feasor. For this reason under the present act unliquidated damages or profits arising from an infringement of a patent are not provable. If they have been liquidated by judgment, decree or otherwise prior to bankruptcy, they are provable, as in other cases of tort.

This was the rule under the act of 1867.[7] In England a patentee has been permitted to prove for the amount of profits made by an infringement of his patent as money had and received.[8] This rule does not obtain in this country.

§ 129. Debts barred by the statutes of limitations.

The courts of the United States recognize generally the statutes of limitations of the several states.[1] Courts of bankruptcy recognize such statutes of limitations. A debt otherwise provable may be barred by a state statute of limitations so that the debt is not allowable, but is such a debt as will be released by a discharge.[2]

In order to be barred in bankruptcy a debt must be barred by the statute of the state in which the petition in bankruptcy is filed.[3] The reason for this is, that a statute of limitation

R. 659; *In re* Filer, 125 Fed. Rep. 262, 5 Am. B. R. 835; *In re* Hildebrandt, 120 Fed. Rep. 992, 10 Am. B. R. 184; *In re* Hirschmann, 104 Fed. Rep. 69, 4 Am. B. R. 715; Johnson v. Spiller, 1 Douglass, 168; Parker v. Norton, 6 T. R. 695.

[6] Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659.

[7] *In re* Boston & Fairhaven Iron Works, 23 Fed. Rep. 880, reversing 29 Fed. Rep. 783.

[8] Watson v. Holiday, 20 L. R. Chan. D. 780.

[1] Bauserman v. Blunt, 147 U. S. 652, 37 L. Ed. 316, and cases there collated.

[2] Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232.

[3] *In re* Resler, 95 Fed. Rep. 804, 2 Am. B. R. 602; *In re* Lipman, 2 Am. B. R. 46, 94 Fed Rep. 353;

affects the remedy and not the right. If the debt is not barred at the time the petition is filed it is a provable debt, because bankruptcy stops the running of the statute.[4]

It may be observed, however, that a claim may be barred by limitations contained in the bankrupt act, which provides that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment.[5]

The failure of a lien claimant to present his claim or lien for recognition or enforcement within the period limited by this provision bars such claim as effectually as an omission to prove any other debt, provided such lien is determined to be incomplete or invalid.[6] In such case the debt may be proved in bankruptcy if presented within the time limited by this provision.

Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232; *In re* Hardin, No. 6048 Fed. Cas., s. c. 1 Hask. 163; *In re* Kingsley, No. 7819 Fed. Cas., 1 Low. 216; *In re* Reed, No. 11635 Fed. Cas., 6 Biss. 250; *In re* Doty, No. 4017 Fed. Cas., 16 N. B. R. 202; *In re* Cornwall, No. 3250 Fed. Cas., 9 Blatch. 114; *In re* Noesen, No. 10288 Fed. Cas., 6 Biss. 443.

In re Ray, No. 11589 Fed. Cas., 2 Ben. 53, it was held that the debt must be barred throughout the limits of the United States.

[4] *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re* McKinney, 15 Fed. Rep. 912; *In re* Waties & Co., 39 Fed. Rep. 264; Trustees v. Bosseiux, 3 Fed. Rep. 817, 4 Hughes 387; *In re* Eldridge, No. 4331 Fed. Cas., 2 Hughes, 256; *In re* Wright, No. 18068 Fed. Cas., 6 Biss. 317; *In re* Graves, 9 Fed. Rep. 816. But see *contra*, *In re* Shepard, No. 12753 Fed. Cas., 1 N. B. R. 439; Nicholas v. Murray, No. 10223 Fed. Cas., 5 Saw. 320.

[5] B. A. 1898, Sec. 57*n*; *In re* Rhodes, 105 Fed. Rep. 231, 5 Am. B. R. 197, 3 N. B. N. 112; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Leibowitz, 108 Fed. Rep. 617, 6 Am. B. R. 628; *In re* Moebius, 116 Fed. Rep. 47, 8 Am. B. R. 590. See also Sec. 132, *post*.

As to the effect of amendment of proof of claim after one year, see Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135.

[6] *In re* Brunquest, No. 2055 Fed. Cas., s. c. 7 Biss. 208.

CHAPTER XIV.

HOW TO PROVE DEBTS.

§ 130. Necessity of proof.

No creditor is entitled to participate in the distribution of a bankrupt's estate or to obtain a dividend upon any claim until such claim or debt has been proved and allowed. The proof must be made in the manner prescribed by the statute and general orders.[1] It is immaterial what may be its form, whether it consists of a contract, account, promissory note, bond or judgment.[2] Secured and unsecured creditors stand upon the same footing as regards proof of their debts.[3]

The fact that the debts are contained in the debtor's schedule is not proof sufficient to entitle a party to participate in the distribution of the estate. It may be stated fraudulently, or it may not exist, or there may be payments, or counterclaims, or set-offs. The reason for requiring proof is not merely to give the creditors a standing in court, but to protect the estate against fraudulent and excessive claims. Even the claims of petitioners in involuntary proceedings must be proved and allowed like other claims.[4] The trustee and the other creditors have a right to question the debt in part or in whole upon proof subsequently required to be taken.[5] They

[1] B. A. 1898, Sec. 57; Gen. Ord. 21; Official Forms Nos. 31 to 37, see Forms 54 to 60, *post; In re* Dunn Hardware & Furniture Co., 132 Fed. Rep. 719, 13 Am. B. R. 147.

[2] *In re* Rosenberg, 144 Fed. Rep. 442, 16 Am. B. R. 465.

[3] Davis v. Anderson, No. 3623 Fed. Cas., s. c. 6 N. B. R. 145, approved *In re* Anderson, 23 Fed. Rep. 500; *In re Davis,* No. 3618 Fed. Cas., 2 N. B. R. 391; *In re* Hayward, 130 Fed. Rep. 720, 12 Am. B. R. 264. But see Rights of Secured Creditors, Sec. 202.

[4] *In re* Cleveland Ins. Co., 22 Fed. Rep. 204. See also Sec. 139, *post.*

[5] See the dissenting opinion of Judge Sanborn in Ayres v. Cone (C. C. A. 8th Cir.), 138 Fed. Rep. 783, 14 Am. B. R. 746. The majority of the court in that case held that where an issue was made and tried as to the validity of the claim of a petitioning creditor, an ad-

therefore have the right to demand that all the statements required by the statute shall be full and complete in making out a *prima facie* case of the validity of the claim and the good faith of the claimant.

§ 131. Who may make the proof.

The proof of a debt against a bankrupt's estate should be made, if possible, by the creditor testifying of his own knowledge.[1] The statute and the general orders prescribed by the supreme court contemplate proof by an agent or attorney of the creditor.[2] When the proof is made by an agent or attorney the reason of the deposition is not made by the claimant in person must be stated.[3] What reason is sufficient to excuse the creditor and to entitle an agent or attorney to make the proof is not stated in the act or general orders. The act of 1867 provided for proof by an agent in two cases only: *first,* when the claimant was absent from the United States, and, *second,* when he was prevented by some good reason from testifying.[4]

A debt due a partnership may be proved by one of the partners, but it must appear on oath that the deponent is a member of the partnership.[5] But a corporation which is a partner *de facto* in a bankrupt firm can not prove a claim against the estate for money advanced and goods sold to the firm, for the reason that the partnership agreement was *ultra vires.*[6] A debt due a corporation may be proved by the

judication was *res judicata* as to the trustee and all other creditors so that the claim could not be contested when proved before the referee.

In re Cleveland Insurance Co., 22 Fed. Rep. 204.

But see Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425.

[1] B. A. 1898, Sec. 57*a*.

[2] B. A. 1898, Sec. 1, clause 9: Gen. Ord. 21.

[3] Gen. Ord. 21; Official Form No. 35, Form No. 58, *post.*

[4] R. S. Sec. 5078; *In re* Whyte, No. 17606 Fed. Cas., 9 N. B. R. 267; *In re* Watrous, No. 17270 Fed. Cas., 14 N. B. R. 258.

[5] Gen. Ord. 21; Official Form No. 34, Form No. 57, *post.*

[6] Wallenstein v. Irvin (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 7 Am. B. R. 256.

treasurer or by the officer whose duties correspond most nearly to those of the treasurer.[7] This rule applies to municipal and political corporations.[8]

A father who has a debt may prove against the estate of his son.[9] Where a wife can contract debts under the laws of a state, she may prove against her husband's estate.[10] Judgment creditors whose liens are invalidated by bankruptcy proceedings are entitled to prove their claims as other creditors.[11] An assignee for the benefit of creditors is entitled to prove for services rendered in the state proceedings prior to and after bankruptcy so far as they were beneficial to the estate.[12] Where a creditor has recovered judgment against two co-defendants and has levied upon the property of one of them, and the other has been adjudged bankrupt, the judgment creditor may prove his whole claim against the bankrupt as an unsecured claim.[13] A creditor of a corporation, who is also a subscriber for its corporate stock, may prove his claim against the estate of the corporation in bankruptcy.[14] A customer of a stock broker, between whom and the broker there is a running account, may prove his claims against the broker's estate as any other creditor.[15] A person who is secondarily liable for a debt of a bankrupt, as endorser or surety, may prove provided the principal creditor fails to

[7] Gen. Ord. 21; Official Form No. 33, Form. No. 56, *post.*

[8] Corn Exchange Bank, No. 3243 Fed. Cas., 15 N. B. R. 216.

[9] *In re* Rider, 96 Fed. Rep. 811, 3 Am. B. R. 192.

[10] *In re* Neiman, 109 Fed. Rep. 113, 6 Am. B. R. 329; *In re* Chapman, 105 Fed. Rep. 901, 5 Am. B. R. 570; *In re* Domenig, 128 Fed. Rep. 146, 11 Am. B. R. 552; James v. Gray (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 12 Am. B. R. 573; *In re* Tucker, 131 Fed. Rep. 647, 12 Am. B. R. 594; *In re* Winkels, 132 Fed. Rep. 590, 12 Am. B. R. 696.

[11] *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506.

[12] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1, overruling *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; Stearn v. Flick, 103 Fed. Rep. 919, 4 Am. B. R. 723.

[13] *In re* Headley, 97 Fed. Rep. 765, 3 Am. B. R. 272.

[14] *In re* Weiner & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

[15] *In re* Gaylord, 113 Fed. Rep. 131, 7 Am. B. R. 577.

[16] B. A. 1898, Sec. 57*i*; see Sec. 116, *ante.*

prove his debt.[16] He is subrogated to no greater right to prove than his principal has.[17] A secured creditor may prove for balance due on a secured claim after the security has been exhausted, although he may have previously proved unsecured claims against the same estate.[18] A creditor of a bankrupt, who after the bankruptcy has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy, and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt.[19]

The trustee of one bankrupt estate may prove claims of the estate which is being administered in bankruptcy against any like estate in the same manner and upon the like terms as the claims of other creditors.[20] Administrators, executors, receivers and other persons who are assignees by mere operation of law may prove in the same manner as the parties whom they represent could have done.[21]

Where a claim has been assigned in good faith and for a valuable consideration the assignee may prove it whether the assignment was made before or after the petition is filed. When the assignment was made before the commencement of the proceedings the proof is made by the assignee, and need not be supported or accompanied by the affidavit of the assignor.[22] Claims which have been assigned after the petition is filed and before proof must be supported by a deposition of

[17] Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[18] *In re* Ball, 123 Fed. Rep. 164, 10 Am. B. R. 564.

[19] *In re* Sweetser, 128 Fed. Rep. 165, affirmed (C. C. A. 1st Cir.), 130 Fed. Rep. 103.

[20] B. A. 1898, Sec. 57*m*.

[21] *In re* Republic Ins. Co., No. 11705 Fed. Cas., 8 N. B. R. 197; *Ex parte* Norwood, No. 10364 Fed. Cas., 3 Biss. 504; *In re* Woods, 133 Fed. Rep. 82, 13 Am. B. R. 240.

[22] Gen. Ord. 21; par. 3; *In re* Murdock, No. 9939 Fed. Cas., 1 Low. 362; *In re* Frank, No. 5050 Fed. Cas., 5 Ben. 164; *In re* Strachan, No. 13519 Fed. Cas., 3 Biss. 181; *Ex parte* Davenport, No. 3586 Fed. Cas., s. c. 1 Low. 384; *In re* Kenney Co., 136 Fed. Rep. 451, 14 Am. B. R. 611.

the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or, if secured, what the security is as required in proving secured claims.[23] Where a person has procured an assignment of claims by fraud he will not be allowed to prove them.[24] An assignee will not be entitled to have a claim allowed which could not be proved and allowed in favor of his assignor.[25]

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable.[26]

Creditors who have received preferences may prove claims, but are not entitled to have them allowed, unless such creditors shall surrender their preferences.[27]

The United States may prove their debts in the same manner as other creditors.[28] But the United States are not required to prove their claims in bankruptcy.[29] A state or municipality is not required to prove its claim for taxes as an ordinary creditor must do.[30]

§ 132. The time within which debts may be proved.

Proof of claims may be filed at any time after the commencement of bankrupt proceedings. A claim may be filed and proved prior to the first creditors' meeting.[1] In practice

[23] Gen. Ord. 21, par. 3.

[24] *In re* State Ins. Co., 16 Fed. Rep. 756.

[25] *In re* Wiener & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

[26] Gen. Ord. 21.

[27] B. A. 1898, Sec. 57*g*, as amended Fed. 5, 1903, 32 Stat. at L. 797. See also Sec. 135, *post.*

[28] *In re* Bousfield & Poole Manufacturing Co., No. 1704 Fed. Cas., 17 N. B. R. 153.

[29] Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; affirming No. 15595 Fed. Cas., 13 N. B. R. 33; U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275; Harrison v. Sterry, 5 Cranch. 289, 3 L. Ed. 104, R. R. Sec. 3466; *In re* Vetterlein, 20 Fed. Rep. 109; U. S. v. Murphy, 15 Fed. Rep. 589, and note; *In re* Stoever, 127 Fed. Rep. 394, 11 Am. B. R. 345.

[30] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

[1] *In re* Patterson, No. 10814 Fed. Cas., 1 Ben. 448.

no claims are generally proved until the first creditors' meeting. Proof of claims may be made subsequent to the first creditors' meeting at any time within one year after the adjudication.[2] But claims can not be proved against a bankrupt estate subsequent to one year after the adjudication, unless they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided,* that the right of infants and insane persons without guardians, without notice of the proceedings may continue six months longer.[2]

Proof of claims are regularly filed with the clerk or referee. The presentation and delivery of a proof of claim to the trustee in bankruptcy within the year after the adjudication is sufficient.[2]*

It has been uniformly held that the language of Section 57*n*, "that claims shall not be proven against a bankrupt estate subsequent to one year after the adjudication," is more than a limitation, that it is prohibitory and that the court has no power or discretion to extend it.[3] This is true even when the creditor did not know of the bankruptcy proceedings within the year,[4] or where he was trying to enforce a security which is held invalid after the year.[4]*

If the proof of a claim, made within the year, is defective, it may be amended after the expiration of the year,[5] but where the proof of claim is withdrawn and a like claim for a different amount filed it can not be treated as

[2] B. A. 1898, Sec. 57*n*.

[2]* Orcutt v. Green, 204 U. S. 96.

[3] Bray v. Cobb, 3 Am. B. R. 788, 100 Fed. 270; *In re* Shaffer, 4 Am. B. R. 728, 104 Fed. 982; *In re* Rhodes, 5 Am. B. R. 197, 105 Fed. 231; *In re* Leibowitz, 6 Am. B. R. 268, 108 Fed. Rep. 617; *In re* Moebius, 8 Am. B. R. 590, 116 Fed. 47.

[4] *In re* Muskoka Lumber Co., 127 Fed. Rep. 886, 11 Am. B. R. 761.

See also Orcutt v. Green, 204 U. S. 96, reversing *In re* Ingalls Bros. (C. C. A. 2d Cir.), 137 Fed. Rep. 517, 13 Am. B. R. 512.

[4]* *In re* Kemper, 142 Fed. Rep. 210, 15 Am. B. R. 675; *In re* Noel, 144 Fed. Rep. 439, 16 Am. B. R. 457.

But see *In re* Fagin, 140 Fed. Rep. 758, 15 Am. B. R. 520.

[5] Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *In re* Roeber (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 11 Am. B. R. 464; Buckingham v. Estes (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 12 Am. B. R. 182.

In re Robinson, 136 Fed. Rep. 994, 14 Am. B. R. 626, proof of a note drawing usurious interest was amended to prove for a claim for money fraudulently obtained by the bankrupt.

an amendment,[6] or where it changes a claim against a partnership to one against a partner as endorsers.[7] Where a creditor has been prevented from proving his claim within the year by the fraud of the debtor he may prove after the expiration, but all creditors who have duly proved their claims are to be paid in full before he can receive anything.[8]

Where a composition has been effected a creditor can not prove a claim more than one year after the date of adjudication.[9]

There is a provision in Section 57*n* that where claims are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of the one-year period that they may be proved within sixty days after the rendition of such judgment. It should be observed that this exception relates only to litigation required to liquidate a claim.[10] This clause evidently refers to claims being liquidated pursuant to the provisions of Section 63*b*. In such cases the time is extended to sixty days after the final judgment is entered provided such judgment is entered after thirty days before the expiration of the year period. If the judgment is entered after the year period he still has sixty days within which to prove his claim.

The limitation of Section 57*n* applies only to claims sought to be asserted in the bankruptcy proceedings, in order to share in the distribution of the estate, but failure to make such proof does not preclude a creditor from pleading his claim in diminution of, or to defeat the claim of the trustee, upon the debt due the bankrupt estate, when asserted in an independent action.[11]

[6] *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806.

[7] *In re* MacCallum & MacCallum, 127 Fed. Rep. 768, 11 Am. B. R. 447.

[8] *In re* Towne, 122 Fed. Rep. 313, 10 Am. B. R. 284.

[9] *In re* Brown, 123 Fed. Rep. 336, 10 Am. B. R. 588.

[10] *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re* Rhodes, 105 Fed. Rep. 235, 5 Am. B. R. 197.

[11] Norfolk & W. R. Co. v. Graham (C. C. A. 4th Cir.), 145 Fed. Rep. 809, 16 Am. B. R. 610; *In re* Mertens Co. (C. C. A. 2d Cir.), 147 Fed. Rep. 177.

§ 133. The manner of making the proof.

A claim or debt is proved by a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.[1] No other pleading is required.[2]

This statement is referred to in the general orders and forms as a deposition.[3] It seems to be in the nature of an affidavit. The word "deposition" was used in the statute of 1867.[4] In construing this word it was said that "a deposition by a creditor proving his claim against the estate of a bankrupt is neither an affidavit nor a deposition, as known in the ordinary practice of law. It is the result of an examination of the creditor made by the officer of the law authorized to make it. . . . In no other court of justice is such testimony required for due proof of debt, but it is evident that congress intended that the court and its officers should, by a careful examination of the creditor (which examination is frequently in the absence of the debtor), purge his conscience and ascertain the real nature of his claim, and that no fraud or combination, either for or against the bankrupt, existed.[5] The statement required by the present act is little more than such a verification as is required by the laws of many states to the claim of a creditor of an estate of a decedent or of a person who has made a voluntary assignment for the benefit of his creditors.

The supreme court has prescribed a form of proof of an unsecured debt,[6] of proof of a secured debt,[7] of proof of a

[1] B. A. 1898, Sec. 57*a*; compare R. S. Sec. 5077.

[2] *In re* Carter, 138 Fed. Rep. 846, 15 Am. B. R. 126.

[3] Gen. Ord. 21; Official Forms Nos. 31 to 36, see Forms Nos. 54 to 59, *post*.

[4] R. S. Sec. 5077.

[5] *In re* Strauss, No. 13532 Fed. Cas., 2 N. B. R. 48; see also *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; but see *In re* Merrick, No. 9463 Fed. Cas., 7 N. B. R. 459.

[6] Official Form No. 31, see Form No. 54, *post*.

[7] Official Form No. 32, see Form No. 55, *post*.

debt due a corporation,[8] of proof of a debt by a partnership,[9] of proof of a debt by an agent or attorney,[10] of proof of a secured debt by an agent.[11] These forms should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.[12]

A deposition to prove a claim against a bankrupt estate must be correctly entitled in the court and in the cause.[13] It should set forth the name and residence of the deponent. It should give one full Christian name of the creditor, as well as his surname.[14] It should state the amount of the debt, which should not include the interest, but sufficient data so that the computation of interest may be made;[15] that the debt was due at the time of filing the petition and is still due; that no part of it has been paid, or if payments have been made such fact should appear; and that there are no set-offs or counterclaims, or, if any, such as there are should be stated.

The statement or deposition must set forth the consideration of the debt or claim.[16] Neither the statute nor the general orders and forms prescribe any form of stating the consideration. The principal object of this requirement is undoubtedly to prevent, or at least check, the proof of fraudulent and fictitious claims, as well as to show that the claim is founded upon a legal consideration which will support the demand, and to afford means for comparing the books of the bankrupt with the proof. The deponent should therefore give such a par-

[8] Official Form No. 33, see Form No. 56, *post.*

[9] Official Form No. 34, see Form No. 57, *post.*

[10] Official Form No. 35, see Form No. 58, *post.*

[11] Official Form No. 36, see Form No. 59, *post.*

[12] Gen. Ord. 38.

[13] Gen. Ord. 21; *In re* Walther, No. 17126 Fed. Cas., 14 N. B. R. 273.

[14] *In re* Valentine, No. 16812 Fed. Cas., 4 Biss. 317.

[15] *In re* Port Huron Dry Dock Co., No. 11293 Fed. Cas., 14 N. B. R. 253.

[16] B. A. 1898, Sec. 57*a*; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

In re Scott, 93 Fed. Rep. 418, 1 Am. B. R. 553. "For legal services" was held an insufficient statement.

ticular and definite statement of the consideration as will enable other creditors to trace out, discover and expose any fraud or illegality of the claim, if any exist. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiries as to the fairness and legality of the claim it does not fulfill the object for which it is required, and should be held insufficient. A judgment duly rendered in a state court can not be impeached collaterally, nor can the consideration upon which it is founded be required into in the absence of fraud.[17] A promissory note is *prima facie* evidence of a consideration, and an instrument under seal always imports a consideration. It would therefore seem that a reference to a judgment, promissory note or an instrument under seal, when these writings are attached to the proof as exhibits, would be a sufficient statement of consideration. The creditors are entitled to show that there was no consideration of a promissory note,[18] and the decisions intimate that the creditor ought to state the consideration of a note in his proof of the debt.[18] Where the consideration of a debt is goods, wares and merchandise sold and delivered, a general statement is not sufficient. The kind of goods, the quantity, the price and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be stated. This is frequently done by an itemized statement of such goods, wares and merchandise attached as an exhibit to the proof of claim, proper reference being made in the statement of the consideration to such exhibit. Where the claim is for contribution by a partner, the amount paid by him for the debt on account of which a claim is made must be set forth.[19]

[17] *Ex parte* O'Neil, No. 10527 Fed. Cas., 1 Low. 163; McKinsey v. Harding, No. 8866 Fed. Cas., 4 N. B. R. 38; see also discussion of this question in proving judgment debts, Sec. 115, *ante*.

[18] *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* DeMetz, No. 3781 Fed. Cas.; *In re* Elder, No. 4326 Fed. Cas., 1 Saw. 73; *In re* Loder, No. 8456 Fed. Cas., 4 Ben. 125, it was held that an omission to state the consideration of a note and whether any payments had been made on it rendered the proof defective.

[19] *In re* Stephens, No. 13365 Fed. Cas., 3 Biss. 187; see also B. A. 1898, Sec. 57*i*.

The assignee of a chose in action must state the consideration that passed between the original parties.[20] But the holder of a promissory note, or other negotiable paper, who took it for value in good faith before the maturity thereof, need not state the consideration which he gave for it.[20]

In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account must be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid.[21]

Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon.[22] It should be observed that the forms prescribed by the supreme court do not contain a clause that no note has been received for such account, nor any judgment rendered thereon. This should be added in cases where it is required by this rule.

The deposition should also state that no security has been received for the debt if such is the fact. If there have been securities received they should be described, and it should appear that there are no other securities than those mentioned. Where the debt is proved by an agent or attorney it must appear in the deposition that he is authorized to make it.

The proof against a firm should state the firm, describing it by the firm name and the individuals that compose it, and should definitely show whether the demand is a firm debt or a joint debt against individual partners.[23] Where a claim has been assigned the proof should set forth the date and facts of the transfer and the name of the original creditor.[24] Two

[20] *In re* Lake Superior Ship Canal, R. R. & Iron Co., No. 7998 Fed. Cas., 10 N. B. R. 76.

[21] B. A. 1898, Sec. 68*a*.

[22] Gen. Ord. 21, par. 1.

[23] *In re* Walton, No. 17129 Fed. Cas., Deady 510.

[24] *In re* Fortune, No. 3586 Fed. Cas., 1 Low. 384.

distinct debts against different estates can not be included in one proof or statement.[25]

The statement should be signed by the claimant or his duly appointed agent. The statement must be made upon oath.[26] The oath may be administered by a referee, any officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, or a diplomatic or consular officer of the United States in any foreign country.[27] Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.[27] An oath to a claim is sufficiently authenticated by the official signature and seal of a notary public.[28]

Whenever a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, must be filed with the proof of claim.[29] If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction must be filed under oath with the claim.[30] After the claim is allowed or disallowed such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[31] The exhibits attached to the proof of debt form one paper and are a part of the deposition. When a party applies for leave to withdraw such exhibits he must show what interest he has in it and the purpose for which he desires to use it.[32] The omission to attach a note to a proof of claim will be deemed waived if no objection is seasonably made.[33]

[25] *In re* Walton, No. 17129 Fed. Cas., Deady 510.

[26] B. A. 1898, Sec. 57*a*.

[27] B. A. 1898, Sec. 20; *In re* Kimball, 100 Fed. Rep. 777, 4 Am. B. R. 144, 2 N. B. N. 46, the attorney of the creditor acted as notary public.

[28] *In re* Pancoast, 129 Fed. Rep. 643, 12 Am. B. R. 275.

[29] B. A. 1898, Sec. 57*b*; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[30] B. A. 1898, Sec. 57*b*; Official Form No. 37, see Form No. 60, *post*.

[31] B. A. 1898, Sec. 57*b*; *In re* Emison, No. 4459 Fed. Cas., 2 N. B. R. 595.

[32] *In re* McNair, No. 8908 Fed. Cas., 2 N. B. R. 343.

[33] *In re* Carter, 138 Fed. Rep. 846, 15 Am. B. R. 126.

§ 134. Proof by a secured creditor.

A secured creditor can resort to one of three remedies. *First,* he may rely upon his security; *second,* he may surrender it and prove the whole debt as unsecured; and, *third,* he may be admitted only as a creditor for the balance remaining after the deduction of the value of the security.[1] In the first case he makes no proof before the referee. In the second case, after abandoning his security, he becomes a general or unsecured creditor, and proves his claim in the same manner as any unsecured creditor.

It is, therefore, the third remedy of a secured creditor that requires consideration. A deposition according to Form No. 32 is proof of such a claim. In such deposition proof is made of the whole debt as in the case of an unsecured claim. To this proof is added a statement of all the securities held by the deponent for the debt. In describing these securities it is proper, but not essential, to state their estimated value. This would seem to be especially desirable when the proof is to be filed for the purpose of enabling the creditor to participate in the proceedings at the first creditors' meeting.[2] Such estimates do not determine the value of these securities.

The value of securities held by secured creditors are determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.[3] Where a claim is secured by a mortgage or lien on property exempt under a state statute the secured creditor can prove only for the balance of his debt not

[1] See Rights of Secured Creditors, Sec. 202, *post. In re* Hines, 144 Fed. Rep. 543, 16 Am. B. R. 493.

[2] B. A. 1898, Sec. 57*e*.

[3] B. A. 1898, Sec. 57*h*: *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 15 Am. B. R. 362; *In re* Lantzenheimer, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re* Ball, 123 Fed. Rep. 164, 10 Am. B. R. 564.

secured and can not receive a dividend on his entire debt and then resort to his security to satisfy the unpaid balance.[4]

The proof of a secured debt according to Form No. 32 does not invalidate the right of the creditor to the securities which he is found to hold.[5] One owing a debt secured by an insurance policy on the life of the bankrupt is entitled to prove the amount of the debt less the surrender value of the policy.[6] Where the security is the property of the bankrupt held by an endorser, or a person secondarily liable, it has been held not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the endorser.[7]

Where a creditor of the bankrupt is secured by pledge, mortgage or other security on property of a person other than the bankrupt he may prove as an unsecured creditor for the full amount of his claim against the estate of the bankrupt.[8] He is not a secured creditor within the meaning of the bankrupt law.

Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he is subrogated to that extent to the rights of the creditor.[9]

§ 135. Proof by creditors who have received preferences.

The statute provides that: "The claims of creditors who have received preferences, voidable under Section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or incum-

[4] *In re* Lantzenheimer, 124 Fed. Rep. 716, 10 Am. B. R. 720.

[5] *In re* Bigelow, No. 1396 Fed. Cas., 2 Ben. 480; King v. Bowman, 24 La. Ann. 506; *In re* Snedaker, 3 N. B. R. 629.

[6] *In re* Newland, No. 10170 Fed. Cas., 6 Ben. 342; Consult *In re* Sauthoff, No. 12379 Fed. Cas., 7 Biss. 167.

[7] Merchants' Bank v. Comstock, 55 N. Y. 24.

[8] Gorman v. Wright (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 14 Am. B. R. 135; Haas-Baruch & Co. v. Portuondo, 138 Fed. Rep. 949, 15 Am. B. R. 130; *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 15 Am. B. R. 362.

[9] B. A. 1898, Sec. 57*i*; Gen. Ord. 21, par. 4.

brances, void or voidable under Section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances." [1]

Prior to the amendment of Feb. 5, 1903,[2] a preference received by a creditor must have been surrendered, whether it could have been avoided or not, before the claim could be allowed.[3] The effect of the amendment is to require a surrender of a preference, conveyance, transfer or incumbrance only when it may be avoided by the trustee, in order to entitle the creditor to an allowance of his claim.[4] The test now is, can the trustee avoid such preference, conveyance, transfer or incumbrance, if so, it must be surrendered; if not, the creditor may retain what he has received and have his claim allowed for the balance of the debt. What constitutes a preference or lien, which may be avoided by a trustee, is considered in another place and need not be repeated here.[5] The amendment does not affect the surrender of preferences in proceedings begun prior to Feb. 5, 1903.[6]

Where a creditor has two separate and distinct debts, a preferential payment on one of them must be surrendered be-

[1] B. A. 1898, Sec. 57*g*, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Privett, 132 Fed. Rep. 592, 13 Am. B. R. 151; *In re* Flynn, 126 Fed. Rep. 422, 11 Am. B. R. 318; *In re* Block (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 15 Am. B. R. 748.

[2] Act of Feb. 5, 1903, 32 Stat. at L. 797.

[3] Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 45 Am. B. R. 1171, 5 Am. B. R. 814; *In re* Abraham Steers Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; McKey v. Lee (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 5 Am. B. R. 267.

That there was no four months' limit to preferences, which must be surrendered prior to the amendment of Feb. 5, 1903, see *In re* Busby, 124 Fed. Rep. 469, 10 Am. B. R. 650.

[4] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447; *In re* Block (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 15 Am. B. R. 748.

[5] See Chapter XVIII. *In re* Pettingill & Co., 135 Fed. 218.

[6] *In re* Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. 584.

fore the other can be allowed.[7] But where the payment extinguishes a debt it need not be surrendered as a condition precedent to the allowance of a subsequent independent debt.[8] Payments made on a running account, where new sales succeed payments and the net result is to increase the value of the estate, do not constitute preferences which must be surrendered before a claim for the balance due on the account may be allowed.[9] Where the last transaction is the payment on account it must be surrendered as a preference before the balance is allowed.[10]

A creditor having a claim, on which he has received a preferential payment, should regularly prove his claim against the estate and the court will then determine the amount of his preference, if any, and require it to be surrendered before allowing his claim.[11] The "proof" of a claim must not be confused with the "allowance" of the claim. Those are two distinct acts or proceedings, and the allowance, absolute or conditional, may or may not result from and follow the proof of the claim.[12] This distinction has been lost sight of in many

[7] *In re* Meyer, 115 Fed. Rep. 997, 8 Am. B. R. 598; Livingston v. Heineman (C. C. R. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; *In re* Delling, 124 Fed. Rep. 852, 10 Am. B. R. 688; Dunn v. Gans (C. C. A. 3d Cir.), 129 Fed. Rep. 750, 12 Am. B. R. 316.

[8] *In re* Abraham Steers Lumber Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332, affirming 110 Fed. Rep. 738, 6 Am. B. R. 315; *In re* Seay, 113 Fed. Rep. 969, 7 Am. B. R. 700; *In re* Bullock, 116 Fed. Rep. 667, 8 Am. B. R. 646; *In re* Wolf & Levy, 122 Fed. Rep. 127, 10 Am. B. R. 153.

[9] Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; Yaple v. Dahl-Milliken Grocery Co., 193 U. S. 526, 48 L. Ed. 776, 11 Am. B. R. 596; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Sagor (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Gans v.. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenham (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

[10] *In re* Watkinson, 146 Fed. Rep. 142.

[11] *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308.

[12] In Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225, the court said: Debts are not the less provable, within the

of the cases reported. Section 57*g* does not prohibit the proof of a claim by a preferred creditor, but merely the allowance of it before the creditor surrenders a recoverable preference.

§ 136. What is a surrender of a security or preference?

A secured creditor can not prove his secured claims until he has surrendered his security.[1] A creditor who has received a preference can not have his claims allowed until he has surrendered his preference.[2] The question, therefore, will be frequently presented, what constitutes a surrender and how is it to be made?

There can be no question of the intention of a creditor who files in the court or with the referee a written statement expressly surrendering his securities or preferences.

meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it."

In re Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308, Judge Ray uses this language: "It will be noted that the proof of a claim is one thing, and the allowance of such claim is quite another thing. Claims may be proved, but not allowed. They may be provable, but not allowable. They may be provable, and then allowed in part only, or on condition only. The statute does not say that the claims of creditors who have received preferences shall not be proved; but it does say that such claims shall not be allowed, unless or until the creditor surrenders his preference. By plain implication the proof of the claim is permitted. The claim of a creditor who has received a preference may be proved; but it can not be allowed, unless he shall surrender the preference. Strange, indeed, is that construction of this law, in the face of those provisions, which will prevent a creditor from coming into court and proving his claim, having the amount of the preference received by him, if any (and that may be a serious and necessary question for determination, both as to the fact of preference and its amount), determined by the court, and then having his proved claim allowed on surrendering the preference. Any creditor has the right to come into court for that very purpose. To hold otherwise will logically prevent a creditor who has in fact received a preference, by way of lien or otherwise, for only a small part of his claim, coming into court and proving his claim, and then having it allowed on surrendering the preference—a mode of procedure the statute expressly permits."

[1] See Proof by Secured Creditor, Sec. 134, *ante*, and Rights of Secured Creditors, Sec. 202, *post*.

[2] B. A. 1898, Sec. 57*g*.

Where a creditor in proving his debt fails to mention his security he will, as a general rule, be deemed to have elected to prove as an unsecured creditor and to have surrendered his security.[3] The courts have frequently permitted such a creditor to amend his proof to change it from unsecured to secured.[4] It would therefore seem, unless mention is made of the security in the proof as originally filed or amended, that proving as an unsecured creditor operates as a surrender of the security. It has been held that proving without mentioning the security does not operate to discharge a mortgage security; that while a creditor is prevented from setting up the same against the trustee, no one but the trustee can avail himself of the fact.[5]

A referee ought not to reject a claim for failure to surrender a preference or property fraudulently transferred to him until he had fixed a reasonable time within which to make the surrender.[6]

The preferred creditor regularly surrenders his preference to the trustee. Property fraudulently transferred belongs to the bankrupt's estate. Preferential security is also to be released for the benefit of the creditors of the bankrupt. The trustee holds the title to all the bankrupt's property.

The statute does not determine the manner in which the surrender should be made. It is usually done by a formal

[3] *In re* Bloss, No. 1562 Fed. Cas., 4 N. B. R. 147; *In re* Brand, No. 1809 Fed. Cas., 2 Hughes 334; *In re* Granger, No. 5684 Fed. Cas., 8 N. B. R. 30; Heard v. Jones, 15 N. B. R. 402; Hatch v. Seely, 13 N. B. R. 383; *Ex parte* Downs, 1 Rose 96.

[4] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761*n*.

In re Cathcart (southern district of Ohio) mechanics' lienholders proved their claims as unsecured creditors and voted for and elected a trustee, who reduced the estate to money. Thereafter these lienholders preferred their liens and were permitted to amend their proof of claims and assert their security and were awarded priority over mortgagees under a mortgage subordinate to the mechanic's lien. Judge Thompson affirmed this ruling of the referee August 21, 1900 (not reported).

[5] Cook v. Farrington, 104 Mass. 212.

[6] *In re* Oppeheimer, 140 Fed. Rep. 51, 15 Am. B. R. 267.

transfer of property or release of security, either voluntarily or upon a judgment of recovery obtained by the trustee. An agreement that other creditors may share in the proceeds of a sale of property which constitutes a preference may be treated as a surrender.[7]

It was held by the courts of bankruptcy at first that the surrender must be voluntary, and that if the trustee is compelled to proceed to a judgment the creditor has not made a surrender, and is therefore not entitled to have his claim allowed.[8] When the question came before the supreme court it decided that a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, may thereafter prove the debt so voidably preferred.[9]

§ 137. Filing proofs of debts.

Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.[1] They are regularly filed with the referee after a reference. Proofs of debt received by any trustee must be delivered to the referee to whom the cause is referred.[2]

The debt will not be deemed proved and can not be allowed where the creditor retains possession of his deposition and does not file it with the referee or clerk.[3] It is the duty of a referee to receive a proof which appears on its face to have been taken by a proper officer and to be correct in form and

[7] *In re* Detert, No. 3829 Fed. Cas., 11 N. B. R. 293.

[8] *In re* Greth, 112 Fed. Rep. 978, 7 Am. B. R. 598; *In re* Owings, 109 Fed. Rep. 623, 6 Am. B. R. 454.

See also *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; *In re* Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334.

[9] Keppel, Trustee, v. Tiffin Savings Bank, 197 U. S. 356, 49 L. Ed. 790, 13 Am. B. R. 552.

[1] B. A. 1898, Sec. 57*c*; Gen. Ord. 20.

[2] Gen. Ord. 20, par. 1.

[3] *In re* Shepard, No. 12753 Fed. Cas., 1 N. B. R. 439.

substance.[4] Upon receipt of such proof the clerk or referee must endorse thereon the day and hour of filing and a brief statement of its character.[5] No notice to the other creditors is required. Where a claim has been duly proved it should be allowed upon receipt by or upon presentation to the judge or referee, unless objection to its allowance shall be made by the parties in interest or its consideration be continued for cause by the court upon its own motion.[6]

The referee is entitled to a fee of 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration.[7]

§ 138. Amendments and withdrawal of proof.

The judge or referee has power, in his discretion, to allow proofs of debt to be amended or withdrawn.[1] In cases of mistake or ignorance, whether of fact or of law, the judge or referee will exercise that power in the absence of fraud, and when all parties can be placed in the same situation they would have been in if the error had not occurred, and where justice seems to demand that it should be done.[1] There are cases, however, which hold that neither the debt nor the deposition can be withdrawn, but the party ought to be allowed and required to amend his proof,[2] but the better authority seems to be as stated above. Where the proceeding is in any manner tainted with fraud, or where a creditor has gained any permanent advantage by the omission, or the estate has been

[4] B. A. 1898, Sec. 57*d*; *In re* Merrick, No. 9463 Fed. Cas., 7 N. B. R. 459.

[5] Gen. Ord. 2.

[6] B. A. 1898, Sec. 57*d*.

[7] B. A. 1898, Sec. 40, as amended Feb. 5, 1903; 32 Stat. at L. 797.

[1] Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *In re* Scott, 93 Fed. Rep. 418, 1 Am. B. R. 533; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* Myers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761, note.

[2] *In re* Lowree, No. 8577 Fed. Cas., s. c. 1 Ben. 406; *In re* Emison, No. 4459 Fed. Cas., 2 N. B. R. 595; *In re* McIntosh, No. 8826 Fed. Cas., 2 N. B. R. 506.

permanently injured thereby, the creditor guilty of such omission will be left where his own act has placed him.[3]

The referee may require an amendment,[4] or the party may apply for leave to correct or withdraw his proof. A creditor may be permitted to amend his proof to correct a clerical omission or formal defect,[5] or to change his proof in form from unsecured to secured,[6] or to enlarge or diminish the amount of the debt,[7] or withdraw his proof for the purpose of proceeding against a dormant partner of the bankrupt.[8] The power to permit amendments extends to all matters contained in the proof. After the claim is allowed or disallowed a written instrument attached to the proof as an exhibit may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.[9]

An amendment may be permitted after the expiration of the year within which claims may be proved.[10] Where in other respects a creditor would be entitled to amend his proofs, the mere prior receipt of dividends is no objection, as they can be

[3] Stewart v. Isidor, 5 Abb. Pr. (N. S.) (N. Y.) 68; *In re* Jaycox, 7242 Fed. Cas., 8 N. B. R. 241; *In re* Parkes, No. 10754 Fed. Cas., 10 N. B. R. 82.

[4] *In re* Elder, No. 4326 Fed. Cas., 1 Saw. 73.

[5] *In re* Myrick, No. 10000 Fed. Cas., 3 N. B. R. 156; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135.

[6] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761*n*.

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[7] *In re* Montgomery, No. 7929 Fed. Cas., 3 Ben. 566.

[8] *In re* Hubbard, No. 6813 Fed. Cas., 1 Low. 190.

[9] B. A. 1898, Sec. 57*b*. See also *In re* McNair, No. 8908 Fed. Cas., 2 N. B. R. 343; *In re* Emison, No. 4459 Fed. Cas., 3 N. B. R. 595.

[10] Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135. *In re* Roeber (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 11 Am. B. R. 464; Buckingham v. Estes (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 12 Am. B. R. 182.

But see *In re* MacCallum & MacCallum, 127 Fed. Rep. 768, 11 Am. B. R. 447.

restored to the trustee.[11] Amendments have been frequently allowed on terms of repayment of dividends already received.[12]

Where a creditor by proof of his debt has taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he has been held precluded from any subsequent change in his proof.[13] But the simple fact that he participated in the election of the trustee, when there is no evidence that he gained any advantage thereby, or that the other creditors have been in anywise prejudicial in consequence of it, or that he was influenced by any fraudulent intent, will not preclude a claimant from making his proof of debt.[14]

It has been held that where a creditor has filed a claim for goods sold and delivered under a contract of sale he is not entitled subsequently to a return of the goods in the possession of the trustee,[15] for the reason that having elected to affirm his contract of sale by proving his claim, he is estopped to afterwards disaffirm it.

Mere formal amendment may be made in the original proofs. Where a change is made by adding a statement of new matter or facts the proof must be resworn after such change.[16] Where the amendment sought to be made relates to a new and different claim from any of those embraced in

[11] *Ex parte* Baxter, 12 Fed. Rep. 72; *In re* Parkes, No. 10754 Fed. Cas., 10 N. B. R. 82.

[12] *In re* Parkes, No. 10754 Fed. Cas., 10 N. B. R. 82; *In re* Baxter, 12 Fed. Rep. 72; *Ex parte* Capot, 1 Atk. 218; *Ex parte* Bielby, 12 Ves. 70; *Ex parte* Waring, 19 Ves. 345, quoted in full in Powles v. Hargreaves, 3 DeGex, A. M. & G. 445; *Ex parte* Bolton, 2 Rose 389; *In re* Barned's Banking Co., 10 L. R. Chan. Ap. 198, s. c. 5 H. L. 157.

[13] New Bedford, etc., v. Fairham, etc., 9 Allen (Mass.) 175, 180; *Ex parte* Solomon, 1 Glyn. & J. 25; Stewart v. Isidor, 5 Abb. Pr. (N. S.) (N. Y.) 68, 1 N. B. R. 485; *In re* Bloss, No. 1562 Fed. Cas., 4 N. B. R. 147.

[14] *In re* McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387; King v. Bowman, 24 La. Ann. 506; *in re* Cathcart, reported in note 6 *ante*.

[15] *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184; Standard Varnish Works v. Haydock C. C. A. 6th Cir.), 143 Fed. Rep. 318, 16 Am. B. R. 286.

[16] *In re* Walther, No. 17126 Fed. Cas., s. c. 14 N. B. R. 273.

the existing proof of debt the proper course is for the creditor to prove his newly discovered debt independently.[17]

§ 139. Allowance of claims.

The formal proof of the debt makes out a *prima facie* case which entitles the claimant to have his claim allowed.[1] The statute provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its motion." [2]

A trustee is a party in interest.[3] Any defense to the claim is as available to the trustee as to the debtor himself.[4]

If the proof of claim is defective the referee should not allow the claim. He may permit it to be filed with leave to amend. Where an objection is interposed at a creditors' meeting by parties in interest it is the duty of the referee to determine the controversy at once, if possible, and if not, as soon as he conveniently can do so.[5] Where the referee has a substantial doubt, resulting from judicial consideration of the inquiry as to the validity of the claim or to the creditor's right to prove it, he may continue the allowance upon his own motion.[6]

Where an objection is made to the allowance of a claim, the objector, though not required to disprove the claim, must produce evidence whose probative force shall be equal to or greater than the evidence offered in the first instance by the

[17] *In re* Montgomery, No. 9731 Fed. Cas., s. c. 3 N. B. R. 430.

[1] *In re* Shaw, 109 Fed. Rep. 780, 6 Am. B. R. 499; Whitney v. Dresser, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 326; *In re* Carter, 138 Fed. Rep. 846, 15 Am. B. R. 126; *In re* Castle Braid Co., 145 Fed. Rep. 224.

[2] B. A. 1898, Sec. 57*d*.

[3] Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313, 3 N. B. N. 497.

[4] *In re* Stern (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 16 Am. B. R. 510.

[5] B. A. 1898, Sec. 57*f*.

[6] *In re* Northern Iron Co., No. 10322 Fed. Cas., 14 N. B. R. 356; *In re* Jackson, No. 7123 Fed. Cas., 7 Biss. 280; see also discussion of this question in Sec. 106, *ante*.

claimant, because the formal proof is evidence even when put in issue.[7] The burden of proof remains on the creditor to establish his debt or claim. If the *prima facie* case is met by evidence by the objector the claim must be disallowed. Witnesses may be examined orally or by deposition and the hearing may be postponed for the purpose of obtaining evidence in relation to the claim.[8] The trustee may call the creditor proving the claim as a witness.[9] It has been held that where a respondent denied the alleged indebtedness to a petitioning creditor and evidence is offered and the court finds the allegations of the petition true and makes an adjudication the same question can not be tried upon the petitioning creditor making proof of his claim.[10] It is doubtful whether creditors not parties to that proceeding, but who subsequently became parties, are estopped to question the validity of a claim of a petitioning creditor or whether an adjudication operates as *res judicata* of any other question than was then put in issue.[11]

[7] Whitney v. Dresser, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 326, affirming *In re* Dresser, 135 Fed. Rep. 495, 13 Am. B. R. 747; *In re* Sumner, 4 Am. B. R. 123, 101 Fed. Rep. 244; *In re* Shaw, 6 Am. B. R. 499, 109 Fed. 780; *In re* Cannon, 14 Am. B. R. 114, 133 Fed. 837; *In re* Carter, 15 Am. B. R. 126, 138 Fed. 846; *In re* Doty, 5 Am. B. R. 58; *In re* Castle Braid Co., 145 Fed. Rep. 224.

[8] *In re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681; *in re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146; *In re* Kaldenberg, 105 Fed. Rep. 232, 5 Am. B. R. 6.

[9] *In re* Castle Braid Co., 145 Fed. Rep. 224.

[10] *In re* Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425; Ayres v. Cone (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 14 Am. B. R. 739.

[11] See dissenting opinion of Judge Sanborn in Ayres v. Cone (C. C. A. 8th Cir.), 138 Fed. Rep. 783, 14 Am. B. R. 746.

In re Cleveland Insurance Co., 22 Fed. Rep. 204, Mr. Justice Matthews observes: "It can not be admitted that the finding that the petitioning creditors has a valid provable claim to the amount of $250, which is all that is necessary as a predicate for the adjudication upon the alleged act of bankruptcy, is conclusive upon the assignee and creditors, so as to dispense with proof of the debt of the petitioning creditor upon the distribution of the estate. It is conclusive so fas as necessary to uphold the adjudication of bankruptcy, but no further. It may still be questioned, in part or in whole, upon the proof subsequently required and taken, so that it might consistently happen that a claim which

The allowance or disallowance of a claim is largely in the discretion of the referee and his decision on the question of fact will not be reversed by a judge unless manifestly contrary to the weight of the evidence.[12]

In practice objections are not frequently made at the time of filing the proof. Such objections may be made in writing or orally.[13] The statute and general orders provide for a re-examination of a claim which has already been allowed.[14] It is under these provisions that objections to creditors being allowed to participate in the distribution of the bankrupt's estate are usually filed.[15]

A claim to which no objection is made and no cause appears for postponing the allowance is regularly allowed when it is filed with the referee. He should endorse upon the claim "filed and allowed," together with the date and hour of the filing.[16] At the close of the first creditors' meeting he should file in his record a list of creditors who have proved their debts at the first meeting, together with their residences and the amount of each creditor's debt.[17] A similar list is subsequently made upon which to base dividends.[18]

Where a claim has been disallowed by a referee on claimant's proof and on petition to review the judge reverses his ruling, the matter should be remanded to enable the trustee to produce proof tending to controvert the claim and not direct the allowance of the claim.[19] If the trustee had put in his

has been found to exist, for the purpose of adjudging bankruptcy against the defendant, might afterwards be held not to exist for the purpose of participating in the distribution of the estate. The assignee and the creditors can not be bound as to their own interests by the acts or default of the bankrupt, resulting in a judgment to which they were not and could not be parties, except so far as that judgment determines the *status* of the bankrupt."

[12] *In re* Rider, 96 Fed. Rep. 811, 3 Am. B. R. 192, 3 N. B. N. 187.

[13] *In re* Cannon, 133 Fed. Rep. 837, 14 Am. B. R. 114.

[14] B. A. 1898, Sec. 57*k* and Sec. 2, clause 2; Gen. Ord. 21, par. 6.

[15] See Re-examination of Claims, Sec. 140, *post.*

[16] Gen. Ord. 2.

[17] Official Form No. 19, see Form No. 38, *post.*

[18] Official Form No. 40, see Form No. 98, *post.*

[19] *In re* Livingston Co. (C. C. A. 2d Cir.), 144 Fed. Rep. 971, 16 Am. B. R. 385.

proof before the referee the judge may direct the allowance of the claim.

§ 140. Reexamination of claims.

Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.[1]

When the trustee or any creditor shall desire the reexamination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such examination.[2] Where a trustee has been appointed he must file the petition for reexamination of a creditor's claim and not another creditor.[3] If the trustee refuses to move for the reconsideration of a claim which has been allowed, when he ought to do so, he may be compelled to act or to permit objecting creditors to act in his name.[4] Where no trustee has been appointed the bankrupt may move for a reexamination and expunction of a claim proved and allowed against his estate.[5] The referee thereupon makes an order fixing a time for hearing the petition, of which due notice must be given by mail addressed to the creditor.[6] If the creditor is unable to attend at that time he should take steps to procure a postponement. Where he fails to appear the claim may be expunged or diminished by default.[7] In

[1] B. A. 1898, Sec. 57*k*.

[2] Gen. Ord. 21, par. 6; *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566.

[3] *In re* Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 538, 9 Am. B. R. 368; *In re* Sully, 15 Am. B. R. 321, 142 Fed. Rep. 895.

[4] *In re* Stern (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 16 Am. B. R. 510; Chatfield v. O'Dwyer, 4 Am. B. R. 313, 101 Fed. 797; *In re* Lewensohn, 9 Am. B. R. 368, 121 Fed. 538; *In re* Baird (D. C.), 7 Am. B. R. 448, 112 Fed. 960.

[5] *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72, 2 N. B. N. 249.

[6] Gen. Ord. 21, par. 6; *In re* Stoever, 105 Fed. Rep. 355, 5 Am. B. R. 250.

[7] *In re* Lount, No. 8543 Fed. Cas., 11 N. B. R. 315.

In re Docker-Foster Co., 123 Fed. Rep. 190, 10 Am. B. R. 584, the court said: "The petition is not before me and I am, therefore, unable to say whether its averments on the subject of insolvency are sufficiently precise and definite to

case it shall be made to appear that any creditor whose debt is contested can not personally attend to be examined in the district where the proceedings are pending without hardship to him, owing to the distance of his residence, or other similar reason, the court will provide by order for the taking of his examination before a referee of the district in which he resides.[8]

A trustee has been held to be barred by laches to petition for a reexamination of a claim once allowed.[9]

The referee may, upon application of the trustee or any creditor, require any designated person who is a competent witness under the laws of the state in which the proceedings are pending to appear before him to be examined.[10] But no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.[11] The creditor is not entitled to witness fees for attendance.[12] Witnesses are summoned by a subpœna issued out of court under the seal thereof and tested by the clerk.[13] Blanks, with the signature of the clerk and seal of the court, may be furnished to referees.[13] The subpœna may be served upon a witness living without the district, but within one hundred miles of place of testifying.[14] A person who disobeys the subpœna may be punished for contempt.[15]

be taken as true, or whether they require proof to be offered by the petitioner. This matter can be determined by the referee and his ruling reviewed, if necessary."

[8] *In re* Kyler, No. 7956 Fed. Cas., 2 Ben. 414; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[9] *In re* Hinckel Brew. Co., 123 Fed. Rep. 942, 10 Am. B. R. 484.

[10] B. A. 1898, Sec. 21 and Sec. 41*a*.

[11] B. A. 1898, Sec. 41*a*. As to who must advance such fees, see Gen. Ord. 10.

[12] *In re* Paddock, No. 10658 Fed. Cas., 6 N. B. R. 396.

[13] Gen. Ord. 3; Official Form No. 30, see Form No. 49, *post*.

[14] R. S. Sec. 876; B. A. 1898, Sec. 41*a*; *In re* Woodward, No. 18000 Fed. Cas., 8 Ben. 112.

[15] B. A. 1898, Sec. 41 and Sec. 2, clause 16. See Contempt, Chap. XXII.

At the time appointed the hearing is had for the purpose of examining the creditor and any witnesses that may be called by either party.[16] The testimony before a referee is usually taken orally. The examination of witnesses may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law.[17] A witness is not entitled to be attended or represented by counsel during his examination.[18]

The referee is required, upon application of any party in interest, to preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance.[19]

The evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narrative, unless he determines the examination shall be taken by question and answer.[20] Upon the application of the trustee the referee may authorize the employment of a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.[21] When a deposition is completed it should be read over to the witness and signed by him in the presence of the referee.[22] The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.[23]

Depositions may be taken when witnesses are beyond the reach of process. The right to take depositions is determined and enjoyed according to the United States laws relating to the taking of depositions, except as otherwise provided by the

[16] Gen. Ord. 21, par. 6.

[17] Gen. Ord. 22.

[18] *In re* Comstock, No. 3080 Fed. Cas., 3 Saw. 517.

[19] B. A. 1898, Sec. 39, clause 9.

[20] Gen. Ord. 22.

[21] B. A. 1898, Sec. 38, clause 5.

[22] Gen. Ord. 22.

[23] B. A. 1898, Sec. 21*b*; R. S. Secs. 863 to 867; *Ex parte* Fisk, 113 U. S. 713, 28 L. Ed. 1117.

statute. Notice of taking depositions must be filed with the referee and also served upon the claimant.[24]

Where a creditor appears he need only offer himself for examination, for the burden of proof is upon the trustee or the other creditors who are contesting his proof.[25] The claimant is entitled to call witnesses and produce counter proofs in support of his claim.

Upon consideration of the evidence the referee makes his order. The claim may be re-allowed or rejected in whole or in part, and the referee may order the claim to stand allowed or to be expunged or diminished accordingly.[26]

It has been held that the provision relating to the examination of claims does not apply to claims for expenses of administration, such as charges and expenses of a receiver.[27] The burden of proof is upon the creditor asking the reexamination to establish the facts which he alleges.[28] An objection to a petition for reexamination on the ground that it lacks particularity should be raised by a motion to make more definite and certain.[29] An inequitable claim has been expunged.[30]

Where the creditor by collusion with the bankrupt has fraudulently enlarged his claim, both the true and fictitious claims should be disallowed, because fraud vitiates the whole debt.[31] A claim which has been purchased with the bank-

[24] B. A. 1898, Sec. 21*c*.

As to right of referee to limit time for taking deposition, see Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[25] *In re* Robinson, No. 11938 Fed. Cas., 8 Ben. 406; *In re* Lount, No. 8543 Fed. Cas., 11 N. B. R. 315. *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

[26] B. A. 1898, Sec. 57*k*; Gen. Ord. 21, par. 6. Official Forms Nos. 38 and 39, see Forms Nos. 70 and 71, *post*.

[27] *In re* Reliance Storage and Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

[28] *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

[29] *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72, 2 N. B. N. 148.

[30] *In re* Knox, 98 Fed. Rep. 585, 3 Am. B. R. 371; see also *In re* Flick, 105 Fed. Rep. 503, 5 Am. B. R. 465.

[31] *In re* Elder, No. 4326 Fed. Cas., 1 Saw. 73; Marrett v. Atterbury, No. 9102 Fed. Cas., 3 Dill. 444; *In re* State Ins. Co., 16 Fed. Rep. 756; *in re* Stephens, No. 13365 Fed. Cas., 3 Biss. 187.

rupt's money will be expunged,[32] but a friend of the bankrupt may purchase with his own money in good faith all the claims against the bankrupt with the intention of putting an end to bankruptcy proceedings. If he fails in such attempt he may prove the debt so purchased and assigned to him.[33] The claims of creditors who have received preferences should be disallowed where such creditors have not surrendered their preferences.[34] Where a secured creditor's debt is expunged he does not surrender his security.[35]. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.[36]

§ 141. How to review the final allowance or rejection of a claim.

If the trustee or the creditor is dissatisfied with the ruling of the referee, he should take proper steps to have it reviewed by the judge.

Any creditor whose claim is rejected in whole or in part, or a trustee who is dissatisfied with the allowance of a claim, may file with the referee a petition that the order may be reviewed by the judge.[1] The petition should be entitled in the cause and set forth the error complained of.[1] It is the duty of the referee forthwith to certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.[2] When com-

[32] *In re* Lathrop, No. 8103 Fed. Cas., 3 Ben. 490.

[33] *In re* Pease, No. 10880 Fed. Cas., 6 N. B. R. 173; *In re* Strachan, No. 13519 Fed. Cas., s. c. 3 Biss. 181.

[34] B. A. 1898, Sec. 57*g*; Pirie v. Chicago Title and Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; *In re* Busby, 124 Fed. Rep. 469, 16 Am. B. R. 650; McKey v. Lee (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 5 Am. B. R. 267.

[35] Dallas v. Flues, No. 3544 Fed. Cas., 19 Pitts. Leg. J. 173.

[36] B. A. 1898, Sec. 57*l*.

[1] Gen. Ord. 27.

As to the practice on petition to review an order or ruling of a referee, see Sec. 32*a*, *ante*.

[2] Gen. Ord. 27; Official Form No. 56, see Form No. 136, *post*.

pleted the certificate is signed by the referee and transmitted to the court.

If the judge is not satisfied with the evidence certified by the referee, he may allow further evidence to be taken before him or refer the cause to the referee for further proofs. He may hear arguments of counsel upon the question certified. The practice is for him to give his opinion upon the point and direct an order or judgment to be entered upon the journal of the court. If the question is certified improperly the court may decline to give an opinion.[3]

The judgment of the court allowing or rejecting a debt or claim of five hundred dollars or over may be reviewed in an appellate court upon an appeal taken as in equity cases.[4] Such appeal must be taken within ten days after the judgment has been rendered.[4]

[3] *In re* Wright, No. 18069 Fed. Cas., 1 N. B. R. 393; *In re* Sturgeon, No. 13564 Fed. Cas., 1 N. B. R. 498.

[4] B. A. 1898, Sec. 25*a*. See Sec. 312, *post*.

CHAPTER XV.

TRUSTEES.

§ 142. Appointment and qualifications.[1]

The office of trustee is created by statute.[2] Trustees are officers of the court of bankrupcty. One trustee or three trustees are regularly appointed by the creditors of the bankrupt estate whose claims have been allowed.[3]

Such trustees are appointed at the first meeting of the creditors after an adjudication, or after a vacancy has occurred in the office of trustees, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, or if there is a vacancy in the office of trustee.[3] Such appointment by the creditors is subject to be approved or disapproved by the referee or by the judge.[4] The selection of a trustee by the creditors will not be disapproved by the court unless it clearly imperils the fair and efficient administration of the estate.[5] The referee can only disapprove of the appointment, the judge alone having power to reject.[6] If the cred-

[1] See also Secs. 105 and 106, *ante*.

[2] B. A. 1898, Sec. 33.

[3] B. A. 1898, Secs. 44 to 50; Creditors' Meetings, Chap. XII.; *In re* Eagles, 90 Fed. Rep. 695, 3 Am. B. R. 733, 2 N. B. N. 402; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 200, 2 N. B. N. 315.

In re Malino, 118 Fed. Rep. 308, 8 Am. B. R. 205.

[4] Gen. Ord. 13; Falter v. Reinard, 104 Fed. Rep. 292, 4 Am. B. R. 782, 2 N. B. R. 1119, affirmed (C. C. A. 6th Cir.), *sub nom. In re* McGill, 106 Fed Rep. 57, 5 Am. B. R. 155; *In re* Henschel (C. C. A. 2d Cir.), 109 Fed. Rep. 801, 6 Am. B. R. 305; *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508; see also *ante*, Sec. 106; compare R. S. Sec. 5034.

[5] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155; *In re* Mangan, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re* Eastlack, 145 Fed. Rep. 68, 10 Am. 529, and the cases cited in the opinion; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[6] *In re* Hare, 119 Fed. Rep. 246, 9 Am B. R. 520; *In re* Mackellar, 110 Fed. Rep. 547, 8 Am. B. R. 669; Gen. Ord. 13.

itors fail to appoint a trustee or trustees, the judge or referee must do so.[7] The judge or referee should exercise this power only when the creditors have had full opportunity to elect a trustee and have failed to do so.[8] Where the creditors elect two trustees instead of three, as required by law, it has been held that the referee should call another meeting of creditors and not himself appoint the third trustee.[9] The court can not appoint an official trustee or any general trustee to act in classes of cases.[10]

A trustee should ordinarily be appointed, although no creditor appears to prove a debt, or although there are apparently no assets.[11] But if the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.[12]

Any individual who is competent to perform the duties and resides or has an office in the judicial district, or a corporation authorized by its charter or by law to act in such capacity, and having an office in the judicial district, may be a trustee.[13] A creditor of a bankrupt or the attorney of the creditor

[7] B. A. 1898, Sec. 44; Sec. 2, clause 17, and Sec. 1, clause 7; Official Form No. 24, see Form No. 43, *post; In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162, 2 N. B. N. 29; *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50, 2 N. B. N. 680; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. N. 315.

In Clark v. Pidcock (C. C. A. 3d Cir.), 129 Fed. Rep. 745, 12 Am. B. R. 309, a trustee was appointed by the court more than a year after the first creditors' meeting.

[8] *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

In re Newton (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 6 A. M. B. R. 52, it was held that on reopening an estate the court could not appoint a trustee until the creditors had failed to do so. See also Fowler v. Jenks, 90 Minn. 74, 11 Am. B. R. 255.

[9] *In re* Wm. F. Fisher Co., 135 Fed. Rep. 223, 14 Am. B. R. 366.

[10] Gen. Ord. 14.

[11] *In re* Cogswell, No. 2959 Fed. Cas., s. c. 1 Ben. 388; Anonymous, No. 457 Fed. Cas., 1 N. B. R. 122.

[12] Gen. Ord. 15; *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

[13] B. A. 1898, Sec. 45. See *In re* Havens, No. 6231 Fed. Cas., 1 N. B. R. 485.

is competent.[14] But a near relation, an attorney, or a confidential clerk of the bankrupt is not competent to serve as trustee.[15] Under the bankrupt law of 1867 a preferred creditor was not eligible to be an assignee.[16] The present act has no such restriction.

It is the duty of the referee immediately upon the appointment and approval of the trustee to notify him in person or by mail of his appointment.[17] The notice must require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.[17] When the trustee accepts the trust he must qualify by giving a bond to the United States within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit.[18] If he declines to accept the trust a vacancy occurs, which must be filled at the next meeting of the creditors.[19]

§ 143. Bonds of trustees.

Before entering upon the performance of his duty a trustee within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit, shall enter into bond to the United States, conditioned for the faithful performance of his duties.[1]

The amount of the bond is fixed by the creditors.[2] If they fail to fix the amount of the bond the court shall do so.[3] Joint trustees may give joint or several bonds.[4] A separate

[14] *In re* Barrett, No. 1043 Fed. Cas., 2 Hughes 444; *In re* Clairmont, No. 2781 Fed. Cas., 1 N. B. R. 276; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. N. 315; *In re* Lazoris, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

[15] *In re* Gordon Supply Co., 129 Fed. Rep. 622, 12 Am. B. R. 94; *In re* Powell, No. 11354 Fed. Cas., 2 N. B. R. 45; *In re* Zinn, No. 18216 Fed. Cas., 4 N. B. R. 370; *In re* Whetmore, No. 17466 Fed. Cas., 16 N. B. R. 514; *In re* Mallory, 8990, Fed. Cas., 4 N. B. R. 153.

[16] R. S. Sec. 5035.

[17] Gen. Ord. 16.

[18] B. A. 1898, Sec. 50*b*; Official Form No. 25, see Form No. 44, *post*.

[19] B. A. 1898, Sec. 44.

[1] B. A. 1898, Sec. 50*b*.

[2] B. A. 1898, Sec. 50*c*.

[3] B. A. 1898, Sec. 50*c*.

[4] B. A. 1898, Sec. 50*j*.

bond must be given in each case.[5] If the trustee fails to give bond within the time prescribed, he is deemed to have declined the appointment, and there is a vacancy in his office.[6]

There must be at least two sureties upon each bond, who shall qualify in a sum equal at least to the amount of the bond.[7] The court must require evidence as to the actual value of the property of sureties.[8] Corporations organized for the purpose of becoming sureties on bonds are authorized by law to do so, and may be accepted as sureties.[9] The court, judge or referee must require evidence as to the actual value of the property of the sureties.[10] The sureties are approved by the judge or referee.[10]

Such bonds should be filed of record in the office of the clerk of the court, and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.[11] Such suits must be brought within two years after the estate has been closed.[12] A pending suit is not abated by the death or removal of a trustee.[13]

Trustees are not liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.[14]

§ 144. Duties of a trustee.

The duties of a trustee in a general way are similar to those of a receiver appointed by a circuit court in a creditor's suit. He is an officer of the court.[1] It is his duty to take the property of the bankrupt, reduce it to money and distribute the proceeds among the creditors as directed by the court.[2]

[5] *In re* McFadden, No. 8785 Fed. Cas., s. c. 3 N. B. R. 104.

[6] B. A. 1898, Sec. 50*k*.

[7] B. A. 1898, Sec. 50*c*, *f*.

[8] B. A. 1898, Sec. 50*d*.

[9] B. A. 1898, Sec. 50*g*.

[10] B. A. 1898, Sec. 50 *b* and *d*, Official Form No. 26, see Form No. 45, *post*.

[11] B. A. 1898, Sec. 50*h*.

[12] B. A. 1898, Sec. 50*m*.

[13] B. A. 1898, Sec. 46.

[14] B. A. 1898, Sec. 50*i*.

[1] McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115; United States v. Dewey, 39 Fed. Rep. 251; *In re* Howard, 130 Fed. Rep. 1004, 12 Am. B. R. 462.

[2] *In re* Howard, 130 Fed. Rep 1004, 12 Am. B. R. 462.

As the representative of the estate, he is bound to exercise his judgment and to act for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. He does not act judicially, but only administratively.[3]

As to everything except fraudulent conveyances and fraudulent preferences under the bankrupt law he takes the property of the bankrupt with notice of all outstanding rights and equities. Whatever the bankrupt could do to make his property available for the general creditors the trustee may do, but nothing more, except that he may sue for and recover that which was conveyed in fraud of the rights of the creditors, and set aside all fraudulent preferences. In this he represents the general or unsecured creditors, and his duties relate chiefly to their interests. Thus it is seen that the trustee represents the bankrupt for some purposes and the unsecured creditors for other purposes.[4] He must deal fairly between them.[5] The court will not permit the trustee to be governed by any creditor or group of creditors, but will direct him to report at a meeting of all the creditors and be governed by them and will appoint independent counsel to advise him.[6]

[3] *In re* Stern (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 16 Am. B. R. 510.

[4] See Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668; Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; *In re* Kansas City Mfg. Co., No. 7610 Fed. Cas., 9 N. B. R. 76; Buckingham v. McLean, 3 McLean, 185, 13 How. 151, 14 L. Ed. 91; Bradshaw v. Klein, No. 1790 Fed. Cas., 2 Biss. 20; Bristol v. Sandford, No. 1893 Fed. Cas., 12 Blatch. 341; *In re* Price, 92 Fed. Rep. 987 at 989, 1 Am. B. R. 606 at 609.

[5] *In re* Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 390, 13 Am. B. R. 193, 196, the court said: "In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed from the trust to which he has been false."

That a trustee represents all the creditors and not any class or group of them, see *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[6] *In re* Arnett, 112 Fed. Rep.

Immediately upon entering his duties the trustee should prepare a complete inventory of all the property of the bankrupt that comes into his possession.[7] In practice the trustee usually files as his inventory the report of the appraisers appointed to appraise the real and personal property of the bankrupt.[8] He must make a report to the court within twenty days after receiving the notice of his appointment of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.[9] The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.[10]

The trustee must keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts.[11] A trustee of a partnership is required to keep separate accounts of the partnership property and of the property belonging to the individual partners.[12] The trustee must report to the court in writing the conditions of the estate, and the amount of money on hand, and such other details as may be required by the courts, within the first month after his appointment, and every two months thereafter, unless otherwise ordered by the court.[13] All accounts of trustees are referred as of course to the referee for audit, unless otherwise specially ordered by the court.[14]

The trustee must, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office

770, 7 Am. B. R. 522; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526; see also *In re* Rusch, 105 Fed. Rep. 607, 5 Am. B. R. 565.

[7] Gen. Ord. 17.

[8] B. A. 1898, Sec. 70*b*, Official Form No. 13, Form No. 37, *post; In re* Gordon Sup. & Mfg. Co., 133 Fed. Rep. 798, 13 Am. B. R. 352.

[9] Gen. Ord. 17. Form of trustee's return, see Official Form No. 47, Form No. 91, *post.*

[10] Gen. Ord. 17.

[11] B. A. 1898, Sec. 47, clause 6.

[12] B. A. 1898, Sec. 5*d.*

[13] B. A. 1898, Sec. 47, clause 10.

[14] Gen. Ord. 17.

where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing.[15]

In case the trustee neglects to file any report or statement which it is made his duty to file or make by the act or by any general order in bankruptcy within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office.[16] The referee must cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk.[16]

He must also furnish such information concerning the estate of which he is trustee, and his administration, as may be requested by the parties in interest.[17] If he secretes or destroys any documents belonging to a bankrupt's estate which came into his charge as trustee, he is liable to imprisonment.[18]

As soon as the trustee receives any money belonging to the estate he must deposit it in one of the designated depositories.[19] This money is withdrawn and disbursed only by check or draft on such depository.[20] The courts of bankruptcy designate by order banking institutions as depositories of the money of bankrupt estates as convenient as may be to the residences of trustees, and must require bonds to the United States, subject to their approval, to be given by such banking institutions, and may, from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond, or change any such depos-

[15] B. A. 1898, Sec. 47*c*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[16] Gen. Ord. 17.

[17] B. A. 1898, Sec. 47, clause 5, and Sec. 49.

[18] B. A. 1898, Sec. 29*a*. He may be prosecuted in a circuit court or a court of bankruptcy; B. A. 1898, Sec. 23*c*, and Sec 2, clause 4.

[19] B. A. 1898, Sec. 47, clause 3, and 61; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58. See *In re* Burt, 27 Fed. Rep. 548; *In re* Thorp, No. 14002 Fed. Cas., 2 Ware 294.

[20] B. A. 1898, Sec. 47, clause 4; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202.

itories.[21] It is probable that the court has power to direct the temporary investment of the money belonging to such estate, or to authorize the same to be deposited in any convenient bank upon interest.[22]

The trustee may, under the direction of the court, submit to arbitration any controversies arising in the settlement of the estate.[23] He may also, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.[24]

The court will not ordinarily give the trustee direction as to whether he should employ an attorney. He must exercise his own discretion.[25] The trustee, and not the creditors, regularly selects his attorney,[26] but he will not be allowed to employ the same counsel that represents interests in conflict with other interests represented by the trustee.[27] A trustee is not required to litigate every question brought to his notice by a creditor, nor can he in every case require indemnity for costs from the creditor. He must act reasonably and in doubtful cases apply to the court.[28]

The trustee must pay upon an order by the court all legal taxes due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts

[21] B. A. 1898, Sec. 61*a*.

[22] This power was especially authorized under the act of 1867, R. S. Sec. 5060. See also B. A. 1898, Sec. 47*a*, clause 1, where it is provided that the trustee shall account for and pay over to the estate under his control all interest received by him upon property of such estate.

[23] B. A. 1898, Sec. 26*a*; Gen. Ord. 33.

[24] B. A. 1898, Sec. 27*a*; Gen. Ord. 33.

[25] *In re* Abram, 103 Fed. Rep. 272, 4 Am. B. R. 575; see also McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115; *In re* Baber 119 Fed. Rep. 520, 9 Am. B. R. 406

[26] *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

But see *In re* Little River Lumber Co., 101 Fed. Rep 552, 3 Am. B. R. 682.

[27] *In re* Rusch, 105 Fed. Rep 607, 5 Am. B. R. 565; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[28] *In re* Baird, 112 Fed. Rep. 960, 7 Am. B. R. 448.

of the proper public officer for such payment he shall be credited with the amount thereof. In case any question arises as to the amount or the legality of such taxes, the same shall be heard and determined by the court.[29]

It is the duty of the trustee to collect and reduce to money the property of the estate for which he is trustee under the direction of the court, and to close up the estate as expeditiously as is compatible with the best interests of the parties in interest.[30] The duty of the trustee in collecting and distributing the estate is treated more fully in subsequent chapters.[31]

To this end he is authorized to prove a claim of the estate which he is administering against any like estate in the same manner as the claims of other creditors are proved;[32] to reclaim and recover for the benefit of the creditors any property conveyed, transferred or assigned, or incumbered by a person adjudged to be a bankrupt, within four months prior to the filing of the petition against the bankrupt and while insolvent; where such conveyance, transfer, assignment or incumbrance was made with intent to hinder, delay or defraud creditors or is void as against creditors by the law of the state, territory or district in which the property is situate,[33] to cause to be set aside levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy, except where a title is acquired by a *bona fide* purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry;[34] and to recover the property or its value in case the bankrupt has given a preference within four months prior to the filing

[29] B. A. 1898, Sec. 64*a*; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300; New Jersey v. Anderson, 203 U. S. ——. Sec. 267, *post*.

[30] B. A. 1898, Sec. 47, clause 2; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747.

[31] Chapters XXIV. and XXV., *post*.

[32] B. A. 1898, Sec. 57*m*.

[33] B. A. 1898, Sec. 67*e*. He has all the rights of creditors to attack such conveyances, Sec. 161, *post*; Crooks v. Stuart, 7 Fed. Rep. 800.

[34] B. A. 1898, Sec. 67*f*; Secs. 192 *et seq. post*.

of the petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.[35]

The trustee is authorized, upon a petition filed by himself or a creditor, to recover for the benefit of the estate any excess of fees paid to an attorney in contemplation of bankruptcy over and above a reasonable fee to be determined by the court.[36]

The trustee is subrogated to and may enforce the rights of a creditor for the benefit of the estate where such creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt.[37]

The trustee must pay dividends within ten days after they are declared by the referee.[38] But he is entitled to recover from the creditor the amount of a dividend received upon a claim which has been reconsidered and rejected. He can recover the whole dividend if the claim is rejected in whole, or the proportional part thereof if rejected only in part.[39] The trustee is required to pay into court all dividends which remain unclaimed for six months after the final dividend has been declared.[40]

When three trustees have been appointed, the concurrence of at least two of them will be necessary to the validity of any act concerning the administration of the estate.[41]

[35] B. A. 1898, Sec. 60*b*; Secs. 194 *et seq.*, and Secs. 204 *et seq. post.*

[36] B. A. 1898, Sec. 60*d*. See Sec. 41*b*, *ante*.

[37] B. A. 1898, Sec. 67*b*; First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[38] B. A. 1898, Sec. 47, clause 9.

[39] B. A. 1898, Sec. 57*l*.

[40] B. A. 1898, Sec. 66*a*.

[41] B. A. 1898, Sec. 47*b*.

In re Wm. F. Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366, it was held that where the creditors of a bankrupt appointed two trustees at their first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified, and joined in the petition for sale, the fact that the petition was presented by two trustees only in the first instance was no objection thereto,

§ 145. Removal of trustees.

Upon application of creditors trustees may be removed by the court for cause upon hearing after notice to them.[1]

What constitutes sufficient cause for removal depends very largely upon the circumstances of each particular case. He may probably be removed if he proves to be incompetent or neglects his proper duties,[2] or if his relationship to the bankrupt is such as to prevent a fair administration of the trust,[3] or if he shows partiality to one class of creditors.[4] The power of removal is discretionary with the court.[5]

The application to remove a trustee must be made to the judge and not to a referee.[6] The application is made in the form of a petition.[7] The petition should be entitled in the court and cause and addressed to the judge. It should state the name of the petitioning creditor, and that it is for the interest of the estate of the bankrupt that the trustee be removed, and then set forth the causes for which the removal is requested and pray that notice may be served upon the trustee to show cause why an order should not be made re-

since, if title to the bankrupt's estate was not vested in the two trustees on their appointment and qualification it became vested in the three on the appointment and qualification of the third.

[1] B. A. 1898, Sec. 2, clause 17.

[2] Gen. Ord. 17; *In re* Morse, No. 9852 Fed. Cas., 7 N. B. R. 56; *Ex parte* Perkins, No. 10982 Fed. Cas., 5 Biss. 254; *In re* Prouty, 24 Fed. Rep. 554.

Erroneous legal advice, where the errors are so gross and frequent as to be evidence of the incompetency of his legal adviser, may be cause for ordering him to employ other counsel, but not necessarily for removing the trustee. See *In re* Blodgett, No. 1552 Fed. Cas., 5 N. B. R. 472.

[3] *In re* Wrisley (C. C. A. 2d Cir.), 133 Fed. Rep. 388, 13 Am. B. R. 193; *In re* Powell, No. 11354 Fed. Cas., 2 N. B. R. 45; *In re* Zinn, No. 18216 Fed. Cas., 4 N. B. R. 370; *In re* Whetmore, No. 17466 Fed. Cas., 16 N. B. R. 514; *In re* Mallory, No. 8990 Fed. Cas., 4 N. B. R. 153.

[4] *Ex parte* Perkins, No. 10982 Fed. Cas., 5 Biss. 254; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[5] *In re* Blodgett, No. 1552 Fed. Cas., 5 N. B. R. 472; *In re* Adler, No. 82 Fed. Cas., 2 Woods 571; *In re* Mallory, No. 8990 Fed. Cas., 4 N. B. R. 153; *In re* Sacchi, No. 12201 Fed. Cas., 6 N. B. R. 398.

[6] Gen. Ord. 13; *In re* Stokes, No. 1347, 5 Fed. Cas., 1 N. B. R. 489.

[7] Official Form No. 52, see Form No. 150, *post*.

moving him. The petition is filed in the clerk's office. A notice in the nature of a rule to show cause is issued by the clerk in the form prescribed [8] and served upon the trustee.

Upon the day named in the notice the trustee must appear and answer the allegations of the petition. If he fails to appear he may be committed for contempt. A hearing is had, as upon a rule to show cause, either upon affidavits or testimony in open court, and counsel for the creditors and for the trustee are heard. The court thereupon makes an order of removal if a proper case is made.[9] The removal of a trustee rests in the sound discretion of the court. It should be exercised to remove a trustee only when sufficient cause is shown rendering such removal necessary for the best interests of the estate. The order for removal is entered upon the journal of the court. When a party is removed for cause the court may compel him to pay all costs of the proceedings,[10] or direct in a proper case that the costs be paid out of the estate.[11]

When a trustee has been removed by order of the court, the creditors of the bankrupt estate should, at their first meeting after such order has been entered, appoint a new trustee.[12] The referee regularly serves notice at once for a meeting to be held for that purpose.[13] The creditors must have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of such meeting.[14] The new trustee is elected in the same manner as the first one.[15] The

[8] Official Form No. 53, see Form No. 151, *post;* B. A. 1898, Sec. 2, clause 17. Gen. Ord. 17 requires seven days' notice in case of a removal for neglecting to file reports.

[9] Official Form No. 54, see Form No. 152, *post.*

[10] B. A. 1898, Sec. 1, clause 18; *In re* Morse, No. 9852 Fed. Cas., 7 N. B. R. 56; Official Form No. 54; see Form No. 152, *post.*

[11] B. A. 1898, Sec. 1, clause 18; *In re* Mallory, No. 8990 Fed. Cas., 4 N. B. R. 153; Official Form No. 54, see Form No. 152, *post.*

[12] B. A. 1898, Sec. 44.

[13] Official Form No. 55, see Form No. 101, *post;* Gen. Ord. 25.

[14] B. A. 1898, Sec. 58*a*.

[15] See How to conduct a creditors' meeting, Sec. 106.

same memorandum of election should be made as in the case of the first election.[16]

Vacancies caused by death, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, are filled in the same manner as when caused by an order of removal. They are appointed by the creditors at a regular meeting. If the creditors do not appoint a new trustee or trustees at such meeting the judge or the referee must do so.[17]

The death or removal of a trustee does not abate any suit or proceding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.[18]

Although there is no special provision for the resignation of a trustee,[19] the judge has undoubtedly power to accept the resignation of a trustee and discharge him from his trust.

§ 146. Suits which may be prosecuted or defended by trustees.

The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him.[1] A judgment against a substituted trustee is not entitled to be paid in full, but may be proved and receive dividends pro rata with other claims.[2] Costs in such cases have been allowed in full.[3]

[16] Official Form No. 22, see Form No. 41, *post*.

[17] B. A. 1898, Sec. 44.

[18] B. A. 1898, Sec. 46.

[19] See R. S. Sec. 5038.

[1] B. A. 1898, Sec. 11 *b* and *c*; see Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 5 Am. B. R. 644; affirmed 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Price v. Price, 48 Fed. Rep. 823.

[2] Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903; *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

[3] *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

A trustee must therefore obtain leave of the court of bankruptcy to appear and either prosecute or defend a suit pending by or against the bankrupt at the time of filing the petition in bankruptcy. Under the act of 1867 the statute provided expressly that the assignee might prosecute or defend any pending action to which the bankrupt was a party.[4] If the trustee does not enter his appearance to prosecute or defend such pending suits they may proceed to final judgment or decree.[5] The cases under the act of 1867 established the doctrine that under that law the validity of a pending suit or of the judgment or decree thereon was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not he was equally bound with any other party acquiring an interest *pendente lite*.[6] The same rule is undoubtedly applicable to the law of 1898, except where the case is stayed under the first paragraph of section 11.[7]

If a suit in the name of the bankrupt is settled and dismissed after bankruptcy proceedings are instituted the trustee may move to have the case reinstated.[8] It was held under the former acts that the bankrupt might sue out a writ of error to take an appeal to review a judgment or decree rendered against him after the commencement of bankruptcy pro-

[4] R. S. Sec. 5047; Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903; Hill v. Harding, 107 U. S. 631, 27 L. Ed. 493; Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985.

[5] In Nat. Distilling Co. v. Seidel (Wis.), 79 N. W. R. 744, it was held discretionary with state court whether it will permit trustee to intervene.

[6] Thatcher v. Rockwell, 105 U. S. 467, 26 L. R. D. 949; Davis v. Friedlander, 104 U. S. 570, 26 L. Ed. 818; Dimock v. Revere Copper Co., 117 U. S. 565, 29 L. Ed. 994; Claflin v. Houseman, 93 U. S. 134, 23 L. Ed. 833; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403.

[7] Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; Reed v. Equitable Trust (Sup. Ct. Ga.), 8 Am. B. R. 242.

[8] Home Ins. Co. v. Hollis, 53 Ga. 659. See also Herdnon v. Howard, 9 Wall. 664, 19 L. Ed. 809; Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 287.

ceedings.[9] Where the judgment or decree is rendered before the bankruptcy proceedings are begun, the trustee is the proper person to prosecute or defend the suit in an appellate court.[10]

In the course of the administration of an estate in bankruptcy the trustee may be obliged to resort to a suit for the purpose of collecting or reducing to money the property of the estate for which he is trustee,[11] or for the purpose of reclaiming or recovering property or the value of such property as has been fraudulently conveyed,[12] or to set aside a fraudulent preference.[13] That the trustee has authority to bring and prosecute such suits can not be questioned. It is not necessary for him to apply to the court for leave to institute such suits. It is his duty to invoke a court of justice for these purposes if he can not obtain possession of the assets in any other way.

Prior to the amendment of February 5, 1903, the trustee was compelled to resort to the state courts for the purpose of collecting and reducing to money the property of the estate of which he was trustee, if a suit was necessary for that purpose. Since the amendment a trustee may at his option bring the suit in a state court or in the court of bankruptcy. This subject has been considered elesewhere.[14]

Suits against the trustee begun after bankruptcy proceedings have been instituted are regularly prosecuted in the court of bankruptcy, especially where that court has posses-

[9] Dormire v. Cogly, 8 Blackf. (Ind.) 177; O'Neil v. Dougherty, 46 Cal. 575; Collins v. Marshall, 10 Rob. (La.) 112.

[10] Herndon v. Howard, 9 Wall. 664, 19 L. Ed. 809; Knox v. Exchange Bank, 12 Wall. 379; 20 L. Ed. 287; Day v. Laflin, 47 Mass. 280; Sandford v. Sandford, 58 N. Y. 67; Vairin v. Edmonson, 9 Ill. 120; Moffit v. Cruise, 7 Cold. (Tenn.) 137.

[11] B. A. 1898, Sec. 47, clause 2

[12] B. A. 1898, Sec. 70*e* and Sec. 67*e*. See also Secs. 203 *et seq.*, *post*.

[13] B. A. 1898, Sec. 60*b*. See also Secs. 203 *et seq.*, *post*.

[14] As to jurisdiction of court of bankruptcy, see Secs. 16*a* to 20, *ante*. As to intervention, see Secs. 152 *et seq.*, *post*. As to suits to recover property as a preference and as fraudulently transferred, see Secs. 203 *et seq.*, *post*.

sion of the property.[15] A trustee may be sued in another court in an action, as for trover or trespass, not involving the possession or seizure of property in the custody of the court of bankruptcy.[16] An action for replevin will be stayed.[17] It is not necessary to first obtain leave of the court of bankruptcy before bringing a suit against the trustee or receiver.[18] When a judgment or decree has been obtained in a court other than that having custody of the property it can not be executed without application to the court of bankruptcy.[19] For this reason the common practice is to intervene in the bankruptcy proceedings and litigate the questions of title to property in the possession of the trustee in that court.[20]

A suit on the bond of a trustee may be prosecuted in a district court [21] or in a state court.[22]

[15] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Hewitt v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; First Nat. Bank v. Chicago Title & T. Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Whitney v. Wenan, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; Keegan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re Corbett,* 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126, 2 N. B. N. 992; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 654.

[16] *In re* Spitzer (C. C. A. 2d Cir.), 130 Fed. Rep. 879, 12 Am. B. R. 346; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 9 Am. B. R. 372.

[17] *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 984, 3 Am. B. R. 658.

[18] *In re* Smith, 121 Fed. Rep. 1014, 9 Am. B. R. 603; *In re* Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 9 Am. B. R. 372.

[19] McFarland Carriage Co. v. Solanus, 108 Fed. Rep. 532, 6 Am. B. R. 221; *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

[20] See Sec. 152, *post.*

[21] U. S. v. Union Surety and Guaranty Co., 118 Fed. Rep. 482, 9 Am. B. R. 114.

[22] Alexander v. Union Surety and Guaranty Co. (N. Y. Sup. Ct., App. Div.), 11 Am. B. R. 32.

§ 147. Limitations of actions by or against trustees.

The statute provides that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." [1]

This limitation applies to suits at law and in equity,[2] and to suits brought in a state or federal court.[3] The limitation applies, although the suit is brought in the name of the trustee for the use of another person.[4] The time is to be reckoned from the final decree. The filing of a bill or petition, although it is necessary to afterwards amend it, prevents the running of the statute.[5] But inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period.[6]

In order to avail of the advantage of the limitation it must be pleaded in some form.[7] Where the bill or petition shows that the cause of action is barred by the statute it may be raised by demurrer.[8] Otherwise it must be set up by plea or answer.

§ 148. Compensation and expenses of trustees.

The compensation of the trustees in suits which were commenced prior to Feb. 5, 1903, is fixed by the statute as follows:[1]

"Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in

[1] B. A. 1898, Sec. 11*d*.

[2] Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 638.

[3] Comegys v. McCord, 11 Ala. 932; Archer v. Duval, 1 Fla. 219; Friedlander v. Holloman, 9 B. R. 331; Peiper v. Harmer, 5 B. R. 252.

[4] Pike v. Lowell, 32 Me. 245.

[5] Bank v. Sherman, 101 U. S. 405, 25 L. Ed. 866.

[6] Amy v. Watertown (No. 2), 130 U. S. 320.

[7] Gormley v. Bunyan, 138 U. S. 623, 630, 34 L. Ed. 1086; Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847; Retzer v. Wood, 109 U. S. 187, 27 L. Ed. 900; Upton v. McLaughlin, 105 U. S. 640, 26 L. Ed. 1197.

[8] Harris v. Collins, 13 Ala. 388.

[1] B. A. 1898, Sec. 48; *In re* Screws, 117 Fed. Rep. 989.

[1] B. A. 1898, Sec. 48.

each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thusand dollars."

Whether, under this provision, a trustee should be allowed a commission upon claims of secured creditors which passed through his hands depended upon whether such payments were considered dividends within the meaning of the statute. In one case it was held to be a dividend and a referee was allowed commissions on secured debts.[2] The courts generally held that the referee and trustee were not entitled to commissions on claims of secured creditors.[3] This question was definitely settled by the amendment of Feb. 5, 1903.[4] Sec. 48*a* was amended to read: "Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one

[2] *In re* Barber, 97 Fed. Rep. 547, 3 Am. B. R. 306.

[3] *In re* Anders Push Button Tel. Co., 136 Fed. Rep. 995, 14 Am. B. R. 643; *In re* Fort Wayne Electric Corp., 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383, 2 N. B. N. 386; *In re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 191; *In re* Hinckel Brewing Co., 124 Fed. Rep. 702, 10 Am. B. R. 692; *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; see also *In re* Kaiser, 112 Fed. Rep. 955, 8 Am. B. R. 108.

[4] 32 Stat. at L. 797.

per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition."

Under this provision a trustee is entitled to the same commissions on moneys disbursed to secured creditors as on that paid to unsecured or general creditors.[5] When property subject to liens is sold by the consent of the lien-holders, the trustee is entitled to commissions on the purchase price in full, even when the lien-holder is the purchaser.[6] Trustees are not entitled to additional compensation for carrying on the business of the bankrupt.[7]

In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.[8]

The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.[9]

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.[10]

[5] *In re* Cramond, 145 Fed. Rep. 566; *In re* Sandford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414.

[6] *In re* Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414.

[7] *In re* Cambridge Lumber Co., 136 Fed. Rep. 983, 14 Am. B. R. 168; *In re* Richards, 127 Fed. Rep. 772, 11 Am. B. R. 581; *In re* Kirkpatrick (C. C. A. 6th Cir.), 148 Fed. Rep. ——.

[8] B. A. 1898, Sec. 48*b*.

[9] B. A. 1898, Sec. 48*c*.

[10] B. A. 1898, Sec. 47*c*.

The compensation allowed to trustees by the act is in full compensation for the services performed by them. A trustee, who is an attorney, is not entitled to additional compensation for professional services rendered the estate.[11] The act provides that neither the referee nor the trustee shall in any from or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed by this act.[12] But this compensation does not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.[13]

In any case in which the fees of the trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.[14]

[11] *In re* Screws, 147 Fed. Rep. 989; *In re* McKenna, 137 Fed. Rep. 611, 15 Am. B. R. 4; *In re* Felson, 139 Fed. Rep. 281, 15 Am. B. R. 185; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154.

[12] Sec. 72 added by the act of Feb. 5, 1903, 32 Stat. at L. 797.

In re George Halbert Co., 134 Fed. Rep. 236, 13 Am. B. R. 399.

[13] Gen. Ord. 35, par. 3; B. A. 1898, Sec. 62; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154, 2 N. B. N. 23.

[14] Gen. Ord. 35, par. 4.

CHAPTER XVI.

WHAT PASSES TO THE TRUSTEE.

§ 149. Title to bankrupt's property.

The title to the property of the bankrupt, whatever it may be, remains in the bankrupt until a trustee is appointed and qualified.[1] Thus where no trustee is appointed the title of the bankrupt is not divested.[2] It has been held that after a petition filed, and before a trustee was appointed, a bankrupt might redeem land sold for taxes.[3] So also a bankrupt has been permitted to institute a suit in his own name for infringement of a copyright after the filing of a petition and prior to the appointment of a trustee.[4] But a bankrupt can not maintain a suit in his own name in relation to his property, not exempt, pending bankruptcy proceedings after the appointment of a trustee.[5]

The title of the bankrupt in the interval between the adjudication and the appointment of the trustee is defeasible, and when the trustee is appointed is divested as of the date of the adjudication of bankruptcy.[6] During this period the

[1] Conner v. Long, 104 U. S. 228, 26 L. Ed. 723; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Hampton v. Rouse, 22 Wall. 263, 275, 22 L. Ed 755; Rand v. Iowa Central Ry. Co., 186 N. Y. 58, 16 Am. B. R. 692; Fuller v. N. Y. Fire Insurance Co., 184 Mass. 12.

[2] Rand v. Iowa Central Ry. Co., 186 N. Y. 58, 16 Am. B. R. 692; Robinson v. Hall, No. 11592 Fed. Cas., 8 Ben. 61.

[3] Hampton v. Rouse, 22 Wall. 263, 22 L. Ed. 755.

[4] Myers v. Callaghan, 5 Fed. Rep. 726.

[5] Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 5 Am. B. R. 644; affirmed *sub nom.* Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

[6] B. A. 1898, Sec. 70*a*; Conner v. Long, 104 U. S. 230, 26 L. Ed. 723.

In Carpenter Bros. v. O'Connor, 16 O. C. C. 526, an application was made to the state court for an order directing a receiver appointed by that court after an adjudication in a court of bankruptcy, to deliver property of the bankrupt in his possession to a trustee, subsequent-

bankrupt occupies a sort of fiduciary relation to his creditors.[7] All titles derived under and through the bankrupt originating during this interval are, by force of law, and without regard to the knowledge or motive of the claimant, defeated by the appointment of a trustee.[8]

Transfers made by the bankrupt after the filing of the petition and before the adjudication are to be considered in the same class with those made within four months prior to the commencement of the bankruptcy proceedings. A *bona fide* sale for value is valid. But as the filing of a petition in bankruptcy is deemed notice to all the world,[9] it would appear that no *bona fide* sale could be made during this interval. A lienor or pledgee may, however, perfect any title during this period which the nature of his lien permits.[10]

The trustee, or his successor, upon his appointment and qualification is vested by operation of law, without a deed of conveyance, with the title of the bankrupt *as of the date he was adjudged a bankrupt*.[11] In this respect the act of 1898

ly appointed by the creditors in the proceedings in bankruptcy, on the ground that the trustee's title vested as of the date of adjudication and prior to the property coming into the possession of the receiver. The application was granted.

[7] March v. Heaton, No. 9061 Fed. Cas., 1 Lowell 278; Williams v. Merritt, 103 Mass. 187.

[8] Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Taylor v. Robertson, 21 Fed. Rep. 209; *In re* Randall, No. 11552 Fed. Cas., 1 Saw. 56; Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

[9] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Bank v. Sherman, 101 U. S. 406, 25 L. Ed. 866.

[10] *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 15 Am. B. R. 362, the court said: "It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely, until he has been adjudicated a bankrupt, as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminate in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all buisness dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts."

[11] B. A. 1898, Sec. 70*a*; *In re* Engle, 105 Fed. Rep. 893, 5 Am. B. R. 372.

differs from the act of 1867, which provided for a deed of conveyance from the register to the assignee, and that such assignment should relate back *to the commencement of the proceedings* in bankruptcy.[12]

A certified copy of the order approving the bond of a trustee is conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded imparts the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had no bankruptcy proceedings intervened.[13]

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.[14]

The trustee takes the title to all the bankrupt's property in this country wherever situated, even though it be in a state other than that in which the bankruptcy proceedings are pending.[15]

A statutory conveyance can have no extra territorial effect upon real estate, and will not, therefore, convey title to property situated in a foreign country.[16] The statute, however, provides that the bankrupt shall "execute to his trustee transfers all of his property in foreign countries." [17] In this way

[12] R. S. Sec. 5044.

[13] B. A. 1898, Sec. 21*e*; see Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847; Herndon v. Howard, 9 Wall. 664, 19 L. Ed. 809; Alexander v. McCullough, 32 Leg. Int. 336; Cove v. Purcell, 56 N. Y. 649; Dambmann v. White, 48 Cal. 439; Burk v. Winters, 28 Ark. 6; Rogers v. Stevenson, 16 Minn. 68; Zantzinger v. Ribble, 36 Md. 32.

[14] B. A. 1898, Sec. 47*c*, 32 Stat. at L. 797.

[15] *In re* Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727, affirmed *sub nom: In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed Rep. 818, 14 Am. B. R. 404.

[16] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Pool, 23 Tex. 517.

[17] B. A. 1898, Sec. 7, clause 5.

the trustee becomes vested with the title to all the property of the bankrupt situated in foreign countries as well as that in the United States.

The trustee is vested by operation of law "with the title of the bankrupt." [18] He does not occupy the position of a purchaser.[19] It was held by many courts that the trustee, by virtue of the bankruptcy proceedings, became vested with the rights of an attachment or execution creditor,[20] but the supreme court overruled this theory.[21] It is now settled that the trustee takes no greater interest in or better title to the property than the bankrupt or his creditors had at the time when his title accrues.[22] He is vested with the rights of creditors to recover property transferred in fraud of the act."[23] Where the bankrupt would be estopped the trustee is estopped, except when he is subrogated to rights of creditors.[24] So also it has been held that where a state statute gives to the party paying usurious interest the right to recover it, the trustee may do so,[25] but not otherwise.[26] Where a bankrupt is a

[18] B. A. 1898, Sec. 70*a*.

[19] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

[20] *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180.

[21] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[22] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633, Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 618; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[23] Sec. 157 *et seq., post.*

[24] First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 637; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[25] Moore v. Jones, 23 Vt. 739; Wheelock v. Lee, 10 B. R. 363; *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

[26] Tiffany v. Boatman's Savings Institution, 18 Wall. 375, 21 L. Ed. 868; Bromley v. Smith, No. 1922 Fed. Cas., s. c. 2 Biss. 511; National Bank v. Gish's assignee, 72 Penn 13; Nichols v. Bellows, 22 Vt. 581; Sparhawk v. Cochran, No. 13203 Fed. Cas., s. c 30 Leg. Int. 233.

beneficiary subject to the discretion of a trustee under a will, he has no interest which may be enforced by his trustee in bankruptcy.[27]

The trustee takes the title of the bankrupt subject to all equities, liens or incumbrances, whether created by operation of law or by the act of the bankrupt, which existed against the property in the hands of the bankrupt,[28] except in cases of levies, judgments, attachments or other judicial liens created against the property within four months preceding the commencement of proceedings in bankruptcy,[29] and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void.[30] Another exception is where, as in unrecorded conditional sales and chattel mortgages, the bankrupt's title is not good against some third person, but because of state laws is good in favor of creditors. In such cases the trustee is given the right of the creditors and gets title to the goods.[31]

[27] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254.

[28] Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 708; York Mfg. Co., 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am B. R. 74; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

[29] B. S. 1898, Sec. 67*f*; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; Cox v. State Bank, 123 Fed. Rep. 654, 11 Am. B. R. 112; *In re* Hymes Buggy & Implement Co., 130 Fed Rep 977, 12 Am. B. R. 477; see Sec 192, *post*.

[30] B. A. 1898, Sec. 60*b*; Pirie v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; Kaufman v. Tredway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862; see Sec. 194, *post*.

[31] B. A. 1898, Sec. 67*a*; *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* New York Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; *In re* Galt, 120 Fed. Rep. 443, 9 Am. B. R. 682; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.

The trustee, however, takes the title only to the extent of the claims of those against whom the title of the third party would not be good; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Garcewich (C. C. A

Where property on which there is a valid lien is sold by a receiver in a foreclosure suit brought by the lienor the title to the proceeds passes to the trustee after satisfying the lien and costs.

The title remains in the trustees, unless conveyed to a purchaser,[32] until the estate is finally distributed by direction of the court.

Upon the confirmation of a composition offered by a bankrupt the title to his property revests in him.[33] But wherever a composition is set aside or a discharge revoked the trustee is, upon his appointment and qualification, vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.[34]

§ 150. The possession of the bankrupt's property.

As soon as a trustee is appointed and qualified he is vested with the title to the bankrupt's property. Property on which there is a mortgage or other lien passes to the trustee, and it is therefore in the custody of the court of bankruptcy.[1]

The vesting of the title gives him constructive possession of the property the instant the title passes.[2] Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if actually

2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Econ. Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615.

[32] B. A. 1898, Sec. 70*c*.

[33] B. A. 1898, Sec. 70*f*. See Stevens v. Earles, 25 Mich. 40. See King v. Remington, 36 Minn. 15; Herndon v. Davenport, 75 Tex. 462; Oliver v. Sanborn, 60 Mich. 346.

[34] B. A. 1898, Sec. 70*d*.

[1] *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689; O'Dell v. Boyden, 148 Fed. Rep. ——.

[2] *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689.

brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court and no person acting under any process from any other court can, without permission of the bankruptcy court, interfere with it, and to so interfere is a contempt of the bankruptcy court.[3] This is true, even if the trustee is not in manual possession of the property.[4]

The filing of a petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction.[5] The effect of filing such a petition is to place the property of the bankrupt constructively in the custody of the court of bankruptcy. Especially if the petition is subsequently sustained by the court.[6] Where the petition is dismissed it may be doubted if the mere filing of a petition will be held such custody as to render void dealings with such property pending an adjudication.

[3] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178. See also Sec. 18, *ante*.

A trustee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshal and receivers are applicable with equal force to the protection of the trustee. Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660; Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815; McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115.

[4] See Sec. 23, *ante*, and cases there cited.

In O'Dell v. Boyden (C. C. A. 6th Cir.), 148 Fed. Rep. ——, in speaking of a membership in a stock exchange as an asset which passed to the trustee, Judge Lurton said: "It was as much in his custody and possession as such a specie of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporal right or equity. The possession may be constructive and not manual, but it is only so because such property is not capable of a more tangible custody."

[5] Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

[6] *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 14 Am. B. R. 689. Consult White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Brooks, 91 Fed. Rep. 508, 1 Am. B. R. 531; Wayne Knitting Mills Co. v. Nugent, 104 Fed. Rep. 530, 4 Am. B. R. 747, s. c. 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

It is the duty of the bankrupt to prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail.[7] The bankrupt should surrender to the trustee the actual possession of all of his property, whether included in the schedule or not.[8] The trustee must himself be active. He should assert his right to the property if the bankrupt does not voluntarily surrender it.[9] A certified copy of the order approving his bond is sufficient authority for a trustee to demand actual possession.[10] If the bankrupt fails or refuses to deliver any part of the property in his possession the trustee may procure an order of court to compel him to do so.[11] The court will enforce such an order by commitment if necessary.[12]

Where an officer of a court has possession of the property the court will direct him to deliver it to the trustee as soon as he is appointed and qualified.[13]

It has been held that a referee may enjoin the interference with the property which has come into his possession.[14]

[7] B. A. 1898, Sec. 7, clause 8.

[8] *In re* Kaplan, 144 Fed. Rep. 159, 16 Am. B. R. 267; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re* McKenna, 9 Fed. Rep. 29; *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 159; see also *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117.

[9] It was held in England that the mere fact that the trustee had not taken possession of a debtor's property for two months after the date of his appointment, but had allowed the debtor to continue trading as before, was not sufficient to destroy his right to the property. *Ex parte* Cooper, 39 L. T. 260.

[10] B. A. 1898, Sec. 21*e*.

[11] *In re* Kurtz, 125 Fed. Rep. 992, 11 Am. B. R. 129; Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178; *In re* Henderson, 130 Fed. Rep. 385, 12 Am. B. R. 351; *In re* How, No. 6747 Fed. Cas., s. c. 18 N. B R. 565.

[12] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178.

[13] Carpenter Bros. v. O'Conner, 16 O. C. C. 526.

[14] *In re* Adams, 134 Fed. Rep. 142, 14 Am. B. R. 23.

§ 151. Trustees not bound to take incumbered interest.

Since the property passes to the trustee subject to equities it may be so burdened with liens and incumbrances as to be without value to the estate. In such case it can not be considered a real asset of the bankrupt.

It has long been a recognized principle of bankrupt law that a trustee is not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit.[1] A trustee in this respect is regarded as being in a very different position from that of an executor of a deceased person. The former takes the property by operation of law, but the latter claims title through his testator, and is bound to perform his obligations to the extent of his assets. The trustee in such cases is required to elect within a reasonable time,[2] and if he refuses to elect when required to do so it is deemed an election to reject the estate.[3] Where the trustee elects not to take the property or right of the bankrupt and charge the estate with it, the property and right, whatever it is, remains in the bankrupt.[4] When a trustee once rejects property as onerous he can not later claim it if it turns out to be valuable.[5] But where a trustee is kept in ignorance of the

[1] Sessions v. Romadka, 145 U. S. 39, 36 L. Ed. 609; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915; American File Co. v. Garrett, 110 U. S. 295, 28 L. Ed. 149; Glenny v. Langdon, 98 U. S. 30, 31, 25 L. Ed. 43; DuShane v. Beall, 161 U. S. 513, 40 L. Ed. 791; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; *In re* Chambers, 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731.

[2] See Leaseholds, p. 165, *post*.

[3] Sessions v. Romadka, 145 U. S. 39, 36 L. Ed. 609; Taylor v. Irwin, 20 Fed. Rep. 615, 620; Amory v. Lawrence, No. 336 Fed. Cas., s. c. 3 Clif. 523; Oakley v. Gardiner, 2 La. Ann. 1005; Lawrence v. Knowles, 5 Bing. N. C. 399; Tuck v. Fyson, 6 Bing. 321; Graham v. Van Dieman's Land Co., 11 Exch. 101.

[4] Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052 Fed. Cas., 6 Law. Rep. 313.

[5] Meyers v. Josephson (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 10 Am. B. R. 687, affirming 121 Fed. Rep. 142, 9 Am. B. R. 345, in which case it was also held that a trustee having rejected an insurance policy as onerous, although he could not claim the proceeds, could claim

existence of certain property and has no opportunity to make an election, the bankrupt can not, after his estate in bankruptcy has been finally closed, assert title to the property on the ground that the trustee had never taken any action in respect to it.[6]

§ 152. Property of other persons in the possession of the bankrupt, and the right to recover the same by intervention—Reclamation.

The statute contemplates that the trustee shall take all the property of the bankrupt which may be applied to the payment of his debts. The property of other persons forms no part of the bankrupt's estate for this purpose.[1]

Property in the possession of the bankrupt, which is claimed by another person, regularly passes to the trustee until its ownership is determined. If there is a controversy with reference to the ownership of such property it is for the court of bankruptcy to determine it.[2] The trustee may decline to take property which is of no value or benefit to the estate.[3] For the same reason the trustee may, when there is no controversy with respect to it, decline to take property in the possession of the bankrupt which is claimed by a third person, or he may return it to such claimant after having taken possession of it, without an order of court. It is safer practice in all cases to have the judge or referee direct its return by order of court. A receiver has no power to return to a claimant property in his possession as receiver without an order of court.[4]

the amount of the cash surrender value.

[6] First National Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698.

[1] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Donaldson v. Farwell, 93 U. S. 641, 23 L. Ed. 993; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Tennessee, etc., R. Co. v. East Alabama Ry. Co., 75 Ala. 529; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 856; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Thompson v. Fairbanks, 196 U. S. 516; 49 L. Ed. 577, 13 Am. B. R. 437; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[2] See Sec. 152*a*, *post*.

[3] See Sec. 151, *ante*.

[4] Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45.

Whether a person can recover property in the possession of the trustee depends upon the title of such claimant as against the bankrupt and his creditors. It may be stated as a general rule that if his title to the property was good as against the bankrupt and his creditors at the time the trustee's title accrued he is entitled to have the property restored to him,[5] or if it has been sold, the proceeds of the sale in place of the property.[6] If his title is invalid as against the bankrupt or his creditors, the property passes to the trustee as a part of the bankrupt estate.[7] It is a question of title including the right of possession. It may be observed that a person may have a valid legal title to property in the possession of a bankrupt and have parted with the right of possession, as in the case of a lease [8] or a pledge.[9] In such cases his title is not good as against the bankrupt, and he may not be entitled to the return of the property. Whatever right the bankrupt may have in such property passes to the trustee if of any value to the estate.

The character and validity of title is to be determined by the local law.[10] Where a sale is made in one state, which contemplates or expressly provides that the property is to be de-

[5] Hewitt v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; First Nat. Bank v. Staake, 201 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[6] In First National Bank v. Title & Trust Co., 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court say: "The sale in the circumstances did not change the situation. The proceeds stood in the place of the property and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of the petitioners on the merits."

[7] First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Patterson, 125 Fed. Rep. 562, 10 Am. B. R. 748.

[8] See Sec. 165, *post*.

[9] See Sec. 198, *post*.

[10] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Miller & Brown (1st case), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re* Legg, 96 Fed. Rep. 326; *In re* Miller and Brown, 135 Fed. Rep. 871, 14 Am. B. R. 443; *In re* Galt (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 13 Am. B. R. 575; *In re* Tice, 139 Fed. Rep. 52, 15 Am. B. R. 97.

livered or used in another state, the law of the latter state governs.[11]

Applying these principles, it is clear that a claimant is entitled to recover his property, *first,* where his title has never passed from him to the bankrupt, as where the bankrupt holds such property as bailee,[12] consignee,[12] or trustee,[13] or, *second,* if, having been induced by fraud to part with his title, as in the case of a fraudulent sale, he may become revested with his title and recover his property,[14] or, *third,* where the bankrupt has conveyed title to the claimant prior to bankruptcy, and retained possession of the property, such possession not being in fraud of creditors.[15] But, if the claimant's title has passed to the bankrupt as by gift or sale,[16] or being valid against the bankrupt is invalid as against the creditors, as where a chattel mortgage or conditional sale has not been registered or recorded according to local law,[17] or for any other reason the

[11] *In re* Legg, 96 Fed. Rep. 326; *In re* Hess, 138 Fed. Rep. 954, 14 Am. B. R. 635.

[12] *In re* Miller & Brown (2d case), 135 Fed. Rep. 871, 14 Am. B. R. 443; *in re* Flanders (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 14 Am. B. R. 27; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Columbus Buggy Co. (C. C. A. 8th Cir.), 143 Fed. Rep. 859.

[13] See Sec. 173, *post;* Welch v. Polley, 197 N. Y. 117, 11 Am. B. R. 215; *In re* Gaskell, 130 Fed. Rep. 235, 12 Am. B. R. 251.

[14] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; *In re* Weil, 111 Fed. Rep. 897, 7 Am. B. R. 90; Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74; *In re* Patterson, 125 Fed. Rep. 562, 10 Am. B. R. 748.

[15] *In re* McDonald, 138 Fed. Rep. 463, 14 Am. B. R. 797; Allen v. Hollander, 128 Fed. Rep. 159, 11 Am. B. R. 753.

[16] *In re* Miller & Brown (1st case), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re* Wood, 140 Fed. Rep. 964, 15 Am. B. R. 411; *In re* Martin-Vernon Music Co., 132 Fed. Rep. 983, 13 Am. B. R. 276; *In re* Rabenau, 118 Fed. Rep. 471, 9 Am. B. R. 180.

[17] *In re* Smith & Shuck, 132 Fed. Rep. 301, 13 Am. B. R. 103; *In re* Press Post Printing Co., 134 Fed. Rep. 998, 13 Am. B. R. 797; *In re* Butterwich, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Dunn Hardw. & Furniture Co., 132 Fed. Rep. 719, 13 Am. B. R. 147; *In re* Tweed, 131 Fed. Rep. 355, 12 Am. B. R. 648; *In re* Tatem, Mann & Co., 110 Fed. Rep. 519, 6 Am. B. R. 426; *In re* Fraizer, 117 Fed. Rep. 746, 9 Am. B. R. 21.

So far as these cases are based on the theory that the trustee occupies the position of an attach-

transaction is fraudulent as to creditors,[18] he is not entitled to recover such property as against the trustee, who is vested with the title of the bankrupt plus the rights of creditors at the time when his title accrues.[19]

In actual practice the difficulty is usually to determine the nature of the transaction from the facts and circumstances of each case; that is, whether it is a sale, bailment, consignment or a conditional sale, in which the title to the property in question passes or not. The difficulty must be solved by the ascertainment of the real intent of the contracting parties as found in their agreement. There are, however, certain discriminating earmarks, so to speak, by which they are distinguished. These are not peculiar to bankruptcy, but are determined by the general law. A few instances arising in bankruptcy may, however, be of assistance.

Where a simple sale is made with delivery and acceptance [20] of the goods, there can be no question. The title passes to the debtor. An option to return a purchase (sale and return) if he should not like is essentially different from an option to purchase if he liked. In the first case the property passes at once, subject to the right to rescind and return.[21] In the other case the title will not pass until the option is determined.[22]

ment or judgment creditor by virtue of the bankruptcy proceedings, they must be held to be overruled by York Mfg. Co. v. Cassell, 201 U. S. 344 50 L. Ed. 782, 15 Am. B. R. 633.

[18] *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re* Ramussen's Estate, 136 Fed. Rep. 704, 13 Am. B. R. 462.

[19] Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 708; First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[20] As to what constitutes an acceptance of machinery guaranteed to work satisfactorily, see *In re* Simpson Mfg. Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 307, 12 Am. B. R. 212; *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 866, 12 Am. B. R. 213, *note*.

[21] *In re* Miller & Brown (1st case), 135 Fed. Rep 868, 14 Am. B. R. 439; *In re* Froehlich Rubber Co., 15 Am. B. R. 72.

[22] *In re* Miller & Brown (2d case), 135 Fed. Rep. 871, 14 Am.

The recognized distinction between a bailment and sale is when the identical article is to be returned in the same or some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. The transaction is a sale. This distinction or test is recognized by the courts.[23]

The consignment of goods to an agent to sell and return the proceeds or the specific goods if not sold stands upon precisely the same footing as any other bailment, and does not involve a change of title.[24]

§ 152a. Conditional sales.

Whether property in the possession of the bankrupt under a conditional sale, by which the title is reserved in the vendor until the property is paid for, passes to the trustee, depends upon whether the arrangement with regard to such property is good as against creditors under the law of the state in which such sale is made.[1] Where a conditional sale is made

B. R. 443; *In re* Froehlich Rubber Refining Co., 139 Fed. Rep. 201, 15 Am. B. R. 72.

[23] Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973; Sturm v. Boker, 150 U. S. 312, 37 L. Ed. 1093; *In re* Galt (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 13 Am. B. R. 575; *In re* Flanders (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 14 Am. B. R. 27; *In re* Rabenau, 118 Fed. Rep. 471, 9 Am. B. R. 180; *In re* Martin-Vernon Music Co., 132 Fed. Rep. 983, 13 Am. B. R. 276; *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; Troy Wagon Wks. v. Vastbinder, 130 Fed. Rep. 232, 12 Am. B. R. 352; *In re* Wells, 15 Am. B. R. 419, 140 Fed. Rep. 752; *In re* Heckathorn, 144 Fed. Rep. 499, 16 Am. B. R. 467.

[24] *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; *In re* Galt (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 13 Am. B. R. 575; *In re* Flanders (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 14 Am. B. R. 27; Deere Plow Co. v. McDavid (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 14 Am. B. R. 653; *In re* Columbus Buggy Co. (C. C. A. 8th Cir.), 143 Fed. Rep. 859.

[1] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709, affirming *In re* Kellogg, 112 Fed. Rep. 52, 7 Am. B. R. 270, and 118 Fed. Rep. 1017;

in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state governs.[2]

Where the arrangement between the vendor and the debtor with respect to such property was good as against the debtor and his creditors at the time the petition in bankruptcy was filed, the vendor's lien or claim to the property will be sustained.[3] The vendor may reclaim such property or recover the contract price from the proceeds of a sale of it, or if the trustee elects to take such property it passes to him subject to the claim or lien of the seller. Where such agreement is good as against the debtor and a part of his creditors, but invalid as to other creditors, a court of bankruptcy has marshalled the several claims accordingly, preserving to each claimant his right of priority in the distribution.[4]

Where the arrangement between the vendor and the debtor is invalid under the state law as to creditors for want of record, it is invalid as against the trustee, and the property passes to the trustee for the benefit of the general creditors.[5]

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Miller & Brown (1), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re* Tice, 139 Fed. Rep. 52, 15 Am. B. R. 97.

[2] *In re* Legg, 96 Fed. Rep. 326; *In re* Hess, 138 Fed. Rep. 954, 14 Am. B. R. 635.

[3] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633, affirming *In re* Kellogg, 112 Fed. Rep. 52, 7 Am. B. R. 270 and 118 Fed. Rep. 1017; *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; Bradley Clark & Co. v. Benson (Sup. Ct., Minn.), 100 N. W. Rep. 670, 13 Am. B. R. 170.

[4] *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760.

[5] B. A. 1898, Sec. 67*a*. *In re* Smith & Shuck, 132 Fed. Rep. 301, 13 Am. B. R. 103; *In re* Press Post Printing Co., 134 Fed. Rep. 998, 13 Am. B. R. 797; *in re* Butterwich, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *in re* Dunn Hardw. & Furniture Co., 132 Fed. Rep. 719, 13 Am. B. R. 147; *In re* Tweed, 131 Fed. Rep. 355, 12 Am. B. R. 648; *In re* Tatem Mann & Co., 110 Fed. Rep. 519, 6 Am. B. R. 426; *In re* Fraizer, 117 Fed. Rep. 745, 9 Am. B. R. 21.

In respect to such property the trustee was held in the earlier cases to occupy the position of a judgment or attaching creditor from the date of the filing of the petition in bankruptcy, which had the effect of an attachment or seizure under legal process.[6] This theory, however, was overruled by the supreme court in the case of *York Mfg. Co.* v. *Cassell.*[7] The conditional sale contract in that case was good under the state law as against creditors who had not actually seized the property by legal process. There was no seizure unless the institution of bankruptcy proceedings had that effect. The supreme court held that the filing of the petition in bankruptcy does not operate to give the trustee, in respect to such property, the rights of an attaching creditor [8] or a subsequent purchaser.[9]

In respect to this kind of property the bankrupt act vests the trustee with the same right or title to the bankrupt's property that belongs to the bankrupt or to his creditors at the time when the trustee's title accrues, and with no greater title or right. The act contemplates that a lien good at that time as against the debtor and as against all his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it may be avoided by the trustee.[10]

[6] *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; A. 4th Cir.), 122 Fed. Rep. 593; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; *In re* Press Post Printing Co., 134 Fed. Rep. 998, 13 Am. B. R. 797; *In re* Butterwich, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Hess, 138 Fed. Rep. 954, 14 Am. B. R. 635.

[7] 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[8] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[9] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

[10] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction will not be upheld as a conditional sale, because it is a fraud upon the creditors of the vendee, and such property passes to the trustee of the vendee.[11] It has been held that a sale with privilege of return of the goods if not satisfactory can not be upheld as a conditional sale when the goods are placed in stock for sale, and that such property as remained unsold can not be reclaimed as against the trustee of the vendee.[12] It has been held that machinery, sold on condition that it shall be made to work satisfactorily and bankruptcy intervenes pending repairs, is the property of the bankrupt, and can not be recovered on the ground that it was a conditional sale, and that the title had not passed by reason of not having been accepted by the bankrupt.[13]

§ 152b. Fraudulent sales.

Whenever a bankrupt has goods in his possession, obtained by purchase from a person who has been fraudulently induced to make the sale prior to bankruptcy, such vendor is entitled to disaffirm the sale and recover such property from the vendee's trustee in bankruptcy.[1]

The most usual species of fraud by a vendee consists in misstatements as to his ability to pay, or means of payment, such

[11] *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re* Ramussen's Estate, 136 Fed. Rep. 704, 13 Am. B. R. 462.

[12] *In re* Miller & Brown (1), 135 Fed. Rep. 868, 14 Am. B. R. 439.

[13] *In re* Simpson Mfg. Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 307, 12 Am. B. R. 212.

But see *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 866, 12 Am. B. R. 213, *note*.

[1] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; *In re* Gany, 103 Fed. Rep. 930, 4 Am. B. R. 576; Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74; *In re* Weil, 111 Fed. Rep. 897, 7 Am. B. R. 90; *In re* Patterson & Co., 125 Fed. Rep. 562, 10 Am. B. R. 748; *In re* Burkle, 116 Fed. Rep. 766, 8 Am. B. R. 542.

as false statements as to what property he owns, or debts he owes, what amount of business he is doing, that his property is unencumbered, and the like. In order to authorize the rescission of an executed sale of goods to one who subsequently becomes a bankrupt on the ground that he obtained the same by false and fraudulent representations, it must be shown that he made such representations, knowing them to be false, and they must have induced the seller to consummate the sale when he would otherwise not have done so.[2] It is not necessary that the false representations should be the sole and exclusive consideration for the credit; but only that they were a material consideration without which in all probability the credit would not have been given.[3] The vendor must have relied upon the statements of the vendee as an inducement to make the sale.[4] A promise to pay cash when the goods are delivered and failure to do so is not a fraudulent representation.[5] A scheme to defraud creditors generally is not sufficient evidence of fraud to justify one creditor to disaffirm his contract of sale.[6] The mere omission of a purchaser of goods to disclose his insolvency to the vendor is not regarded as fraudulent in itself.[7] There is a distinction between withholding information and making false statements with reference to one's financial condition.

A statement made by a person to a mercantile agency, which statement has been shown to the vendor prior to the sale, and upon which he relied in giving such person credit, may be considered a statement of the vendee made to the vendor, and, if false in fact, will amount to a false representation

[2] *In re* Patterson & Co., 125 Fed. Rep. 562; 10 Am. B. R. 748; *In re* Gany, 103 Fed. Rep. 930, 4 Am. B. R. 576; *In re* Roalswick, 110 Fed. Rep. 639, 6 Am. B. R. 752; *In re* O'Conner, 114 Fed. Rep. 777, 7 Am. B. R. 428; Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74.

[3] *In re* Gany, 103 Fed. Rep. 930, 4 Am. B. R. 576.

[4] *In re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 60; *In re* Davis, 112 Fed. Rep. 294, 7 Am. B. R. 276.

[5] *In re* Lewis, 125 Fed. Rep. 143, 10 Am. B. R. 741.

[6] *In re* O'Conner, 114 Fed. Rep. 777, 7 Am. B. R. 428.

[7] *In re* Davis, 112 Fed. Rep. 294, 7 Am. B. R. 276.

with reference to his financial condition.[8] On the other hand, the report of a mercantile agency derived from other sources than the person seeking credit, is not such a fraudulent representation as to justify rescission.[9]

Another ground of rescission of an executed sale is that the vendee purchased the goods with a positive intention not to pay for them. The supreme court says:[10] "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." In some states it is held that even a positive intention not to pay, if unaccompanied with any "artifices intended and fitted to deceive" will not avoid a sale.[11] The courts of bankruptcy will follow the state rule in this respect.

In the case of a fraudulent sale the title passes to the vendee, subject to be defeated at the option of the vendor.[12] He may affirm or rescind the sale, but he can not do both. If he elects to affirm the contract by some positive action, or unreasonably delays to disaffirm it, he is not entitled to a return of the goods in the possession of the trustee. Proving a claim in bankruptcy for the total amount of the goods sold has been held an election to affirm the contract of sale, and that the vendor was not entitled afterwards to the return of the unsold goods in the possession of the trustee.[13]

[8] Consult *In re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 60; *In re* Patterson, 125 Fed. Rep. 562; 10 Am. B. R. 748; *In re* Weil, 111 Fed. Rep. 897, 7 Am. B. R. 90. See American Lumber Co. v. Taylor (C. C. A. 3d Cir.), 137 Fed. Rep. 321, 14 Am. B. R. 231.

[9] Consult *In re* Roalswick, 110 Fed Rep. 639, 6 Am. B. R. 752.

[10] Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993.

[11] *In re* Lewis, 125 Fed. Rep. 143, 10 Am. B. R. 741.

[12] Benjamin on Sales, Sec. 433.

[13] Standard Varnish Wks. v. Haydock (C. C. A. 6th Cir.), 143 Fed. Rep. 318, 16 Am. B. R. 286; *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184; Ormsby v. Dearborn, 116 Mass. 386; Seavey v. Potter, 121 Mass. 297.

§ 152c. Confusion of goods.

In order to recover property in the possession of the bankrupt, the claimant must be able to clearly identify the specific property belonging to him. If the property has become commingled or confused with other property of the bankrupt so that it possess no *indicia* or earmarks by which it may be distinguished from all other property of the same description, it is conceived to be the property of the bankrupt, and as such passes to the trustee.[1] In such cases the person who owns the property is interested only as a general creditor of the estate.

Where the property can be distinguished from other property of the bankrupt it does not pass to the trustee. Thus, where a commission merchant kept the proceeds of a sale for a customer separate from his other funds, it does not pass to his trustee in bankruptcy.[2] So also an incomplete vessel constructed under a contract providing for payments as the work progressed which the trustee declined to complete, does not pass, but the title remains in the person for whom it was being built.[3] Goods having been sold by the bankrupt and separated from other goods belonging to him do not pass to his trustee, but may be recovered by the purchaser.[4]

Where a debtor obtains the possession of goods and proceeds to commingle them with his own before bankruptcy the courts will acord a lien to the owner upon the mass for the value of the things converted, on the ground that where a tort feasor has mingled the property of the owner with his own a lien attaches to the mass *pro tanto*, and the mass passes to the trustee subject to such lien.[5] Where a com-

[1] Wood M. & R. Co. v. Broke, 9 B. R. 395; Adams v. Meyers, No. 62 Fed. Cas., s. c. 1 Saw. 306; Rahilly v. Wilson, No. 11532 Fed. Cas., 3 Dill. 420; Deere Plow Co. v. McDavid (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 14 Am. B. R. 653; American Lumber Co. v. Taylor (C. C. A. 3d Cir.), 137 Fed. Rep. 321, 14 Am. B. R. 231.

[2] *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417.

[3] *In re* MacDonald, 138 Fed. Rep. 463, 14 Am. B. R. 797.

[4] Allen v. Hollander, 128 Fed. Rep. 159, 11 Am. B. R. 753.

[5] Erie R. R. Co. v. Dial (C. C. A. 6th Cir.), 140 Fed. Rep. 689, 15 Am. B. R. 559; Willoughby v. Wein-

mission agent sold goods of his principal after notice not to sell particular goods, and commingled the funds with his other moneys, the court held that the principal could equitably follow the moneys received from the sale of such goods into the hands of any person who had received them with knowledge of their trust character.[6]

§ 152d. Proceedings to recover property in the possession of the trustee.

A person claiming to own property in the possession of the bankrupt at the time of the filing of the petition in bankruptcy regularly asserts his claim in the court of bankruptcy. Section 2 of the Bankrupt Act confers upon these courts ample power to determine all such controversies.[1]

A state court has concurrent jurisdiction of an action of trover to determine the title to property in possession of the trustee in bankruptcy as a part of the bankrupt's estate.[2] But

berger, 79 Pac. Rep. 777; Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 618; Smith v. Au. Gres (C. C. A. 6th Cir.), 148 Fed. Rep. ——; Smith v. Motley (C. C. A. 6th Cir.), 149 Fed. Rep. ——.

[6] Bills v. Schliep (C. C. A. 2d Cir), 127 Fed. Rep. 103, 11 Am. B. R. 607.

[1] In Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45, Mr. Justice Day, speaking for the supreme court, said: "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon and rights therein."

See also *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 646; *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685.

[2] *In re* Spitzer (C. C. A. 2d Cir.), 130 Fed. Rep 879, 12 Am. B.

the possession of such property can not be recovered by replevin instituted in the state court.[3] The reason is that the petition in bankruptcy is in effect an attachment, and a court of bankruptcy acquires constructive custody of all property in the possession of the debtor from the filing of the petition. If the claimant desires to recover specific property he must apply to the court of bankruptcy.

A court will not determine the right of a claimant to such property by a summary proceeding, as upon rule to show cause.[4] The proceeding should be plenary in its nature. A claimant of such property may bring an original suit against the trustee or receiver in a court of bankruptcy for the recovery of the specific property claimed to be owned by him.

The usual practice, however, is to file an intervening petition in the bankruptcy proceedings.[5] The courts of bankruptcy will enforce in the bankruptcy proceedings such agreements with the bankrupt, as absolute or conditional sales, bailments, pledges, leases, liens, and the like, which are valid under the local law, and will avoid such as are invalid. In

R. 346; Kanter v. Cohen, 121 Fed. Rep. 984, 9 Am. B. R. 372; Tiuda v. Osgood, 71 N. H. 185; Weeks v. Fowler, 71 N. H. 518.

[3] White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658; *In re* Weinger-Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; Crosby v. Spear, 98 Me. 542, 11 Am. B. R. 613; Weeks v. Fowler, 71 N. H. 221; Cox v. State Bank, 125 Fed. Rep. 654, 11 Am. B. R. 112.

[4] *In re* Mundle, 139 Fed. Rep. 691, 14 Am. B. R. 680.

[5] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

In re Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198, 3 N. B. N. 316, the court said: "The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 171), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 4 Am. B. R. 646, the court said: "The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

this way the rights of persons dealing with the bankrupt prior to his bankruptcy and his general creditors, as they existed at the date of the filing of the petition in bankruptcy, may be preserved and enforced in the bankruptcy proceedings without resort to a separate suit for that purpose. In other words, the courts of bankruptcy will administer the debtor's property, having respect to all claims against it which are not invalid under the bankrupt law and are valid under the state law at the time of filing the petition in bankruptcy and avoiding such as are invalid under the state law to the same extent as state courts having jurisdiction to determine the controversy.

The Petition.—An intervening petition should be entitled in the district court and the bankruptcy proceedings and addressed to the judge. It may be as follows: "The District Court of the United States for the —— District of —— *In re* A. B., bankrupt. Intervening Petition of the X Y Company, Petitioner. The Honorable S. M., Judge of the District Court of the United States for the —— District of ——." The trustee or receiver, if one has been appointed, is the proper respondent. The bankrupt and the creditors are not necessary or proper parties to the petition.

The petition[6] should state the date of filing the petition in bankruptcy, the adjudication, the appointment of the trustee or receiver, and that the property in question is in the possession of the trustee or receiver as a part of the bankrupt's estate. It should set forth the petitioner's claim of title to the specific property which is sought to be recovered, and pray that the property specified may be returned to the petitioner, or if it has been sold that the proceeds of such sale may be paid to him, or for such relief as may be desired. The petition should be signed and verified[7] by the petitioner or some person who is able of his own knowledge to swear positively to the facts stated in the petition.

[6] For form of petition and orders thereon, see *In he* Hemstreet, 8 Am. B. R. 760. See Form No. 34*b*, *post*.

[7] B. A. 1898, Sec. 18*c*.

Proceedings on Intervening Petition.—An intervention of this character, sometimes called a reclamation proceeding, is really an equitable intervention and a "controversy arising in bankruptcy," as distinguished from proceedings in bankruptcy.[8] The practice is very similar to that upon an intervening petition filed in a suit in equity.

The petition should be filed by leave of court with the clerk, and not with the referee. The judge may hear and determine the controversy or refer the matter to the referee in charge of the bankruptcy proceedings. The latter course is usually pursued, and in that case all subsequent proceedings are had before the referee.

The court may permit the petitioner to take possession of the property in controversy before the trial upon giving a forthcoming bond.[9]

It is not necessary to issue a subpœna for the trustee. He must, however, have notice of filing the intervening petition and a reasonable time within which to put in his defense. It is common practice for the judge to enter an order requiring the trustee to show cause on a day fixed in the order why the prayer of the petitioner should not be granted. A copy of this order and the petition is served upon the trustee or his attorney. Proof of service is made by filing a copy of the order with service accepted by the trustee or his attorney, or by an affidavit of any person serving the papers. No notice to creditors is required.

The trustee may, before the day fixed in the order, demur, plead or answer to the petition. When the issues are properly joined a trial is regularly held before the referee, who has power to try the rights of the intervening petitioner, subject to review by the judge.[10] The trial may be had before the

[8] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; Smith v. Means (C. C. A. 7th Cir.), 148 Fed. Rep. 89.

[9] As was done *In re* Froelich Rubber Refining Co., 139 Fed. Rep. 201, 15 Am. B. R. 82.

[10] *In re* Drayton, 135 Fed. Rep. 883, 13 Am. B. R. 602; *In re* Hadden Rodee Co., 135 Fed. Rep. 886, 13 Am. B. R. 604.

judge in the first instance. A claimant waives his common-law right to a trial by jury by intervening in a bankruptcy proceeding for the reason that bankruptcy is governed by the same rules as apply to equity cases.[11] The right to a trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction.[12]

At the trial evidence may be introduced by oral testimony or by deposition.[13] Witnesses may be compelled to appear and testify, and if books or papers are required a subpœna *duces tecum* may be issued. The subpœna for a witness must be issued out of the court under the seal thereof, and be tested by the clerk.[14] Blanks with the signature of the clerk and the seal of the court may be furnished to the referees upon application.[15] A witness can not be compelled to attend a hearing more than one hundred miles from his residence.[16] The petitioner is entitled to an inspection of all accounts and papers of the trustee, and to be furnished with any information concerning the bankrupt's estate which the trustee has, although the trustee may be resisting the petitioner's claim.[17] The burden of proof is on the claimant to establish his claim to the property.[18] The referee will usually hear arguments of counsel, and thereupon enter an order either restoring the property, or dismissing the petition, or as the rights of the parties may require.

This order of the referee may be reviewed by the judge as in other cases, and the order of the judge may be reviewed

[11] Dokken v. Page (C. C. A. 8th Cir.), 147 Fed. Rep. 438.

[12] B. A. 1898, Sec. 19*c*. Flippin v. Kimball (C. C. A. 4th Cir.), 87 Fed. Rep. 258; Kennedy v. R. R. Co., 3 Fed. Rep. 97.

[13] B. A. 1898, Sec. 21, as amended Feb. 5, 1903, 32 Stat. at L. 797; R. R. Secs. 863 to 866.

[14] Gen. Ord. 3; Official Form No. 30, see Form No. 40, *post;* R. S. Sec. 911.

[15] Gen. Ord. 3.

[16] B. A. 1898, Sec. 41. *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

[17] *In re* Saur, 122 Fed. Rep. 101, 10 Am. B. R. 353.

[18] *In re* Heckathorn, 144 Fed. Rep. 499, 16 Am. B. R. 467; *In re* Wood, 140 Fed. Rep. 964, 15 Am. B. R. 411.

by a circuit court of appeals under Section 6 of the act of March 3, 1891, on appeal, but not on a petition to review."[19]

§ 153. What property passes to the trustee generally.

It may be stated as a general rule that all goods, property and rights of action properly available for the payment of the bankrupt's obligations or debts pass to the trustee in bankruptcy. Property subject to exemption under the state law does not pass.[1] The claim of a wife for alimony is not a property right and property awarded her as alimony after her bankruptcy does not pass to her trustee in bankruptcy.[2]

With this exception the statute enumerates six classes of property,[3] the title of which shall be vested in the trustee, namely, to all, *first,* documents relating to his property; *second,* interests in patents, patent rights, copyrights, and trademarks; *third,* powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; *fourth,* property transferred by him in fraud of his creditors; *fifth,* property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and, *sixth,* rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

These provisions relate only to the property of the bankrupt or property in his possession, and do not include any other property.[4] They embrace all the real and personal property

[19] 26 Stat. at L. 862; Hewit v. Berlin Mach. Wks., 194 U. S. 297, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256.

[1] See Exemption, Chap. XVII.

B. A. 1898, Sec. 6, provides that "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

[2] *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. 733.

[3] B. A. 1898, Sec. 70*a*.

[4] Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865; Tennessee, etc., R. R. Co. v. East Alabama Ry. Co., 75 Ala. 529; *In re* Angier, 388 Fed. Cas., 4 N. B. R. 619.

situated in the United States, but do not include that situated in foreign countries.[5] A bankrupt may be compelled to execute a transfer of his real estate situated in foreign countries.[6] Vessels upon the high seas are deemed within the jurisdiction of the nation and the proper court of bankruptcy.[7] All personal property, wherever it is, passes under these provisions [8] for the reason that personal property is deemed to follow the domicile of the owner. Citizens of foreign countries in which the personal property may be situated are not bound by the bankrupt law of the United States. It has no extra-territorial effect. Although such property passes to the trustee as of the date of adjudication, it may be deemed not to have passed to affect rights acquired by foreign creditors in foreign forums prior to the actual possession of the trustee. This seems to be the rule in the United States with reference to foreign bankruptcy. The American courts have upheld attachments of resident creditors of foreign bankrupts upon property situated in this country against a foreign assignee who had not actually taken possession of such property.[9]

Such property passes to the trustee whether named in the schedule of the bankrupt or not.[10]

[5] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Pool, 23 Tex. 517.

Property in states other than that in which bankruptcy proceedings are pending passes to the trustee. See *In re* Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727; affirmed *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404.

[6] Sec. 7, clause 5, of the act of July 1, 1898, 30 Stat. at L.

[7] Crapo v. Kelly, 16 Wall. 610, 21 L. Ed. 430.

[8] Cannon v. Wellford, 22 Grat. (Va.) 105; Crapo v. Kelly, 16 Wall. 610, 21 L. Ed. 430; Selkrig v. Davies & Salt, 2 Dow 230, s. c. 2 Rose 97; decided by the House of Lords in 1814. For an exhaustive discussion of this subject, see Story's Conflict of Laws, Secs. 403 to 421.

[9] Blake v. Williams, 6 Pick. (Mass.) 286; Milne v. Moreton, 6 Binn. (Pa.) 353; Dawes v. Boylston, 9 Mass. 337; Osgood v. Maguire 61 N. Y. 529; Willitts v. Waite, 25 N. Y. 583; Abraham v. Plestoro, 3 Wend. (N. Y.) 538; Saunders v. Williams, 5 N. H. 213; Blanchard v. Russell, 13 Mass. 1; Fox v. Adams, 5 Greenl. (Me.) 245; Ingraham v. Geyer, 13 Mass. 146; Harrison v. Sterry, 5 Cranch 289, 3 L. Ed. 104; Zacher v. Fidelity Trust and Safety Vault Co. (C. C. A. 4th Cir.), 106 Fed. Rep. 593, 45 C. C. A. 480.

[10] Holbrook v. Coney, 25 Ill. 447;

§ 154. Documents.

All documents relating to the bankrupt's property pass to the trustee.[1] These include [2] deeds or other muniments of title, contracts, securities (as bonds, mortgages, etc.), bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to his business. While, strictly speaking, a document is a written or printed paper, it may also include anything bearing a legible or significant inscription, as a stencil-plate or marking and cancelling stamp or a seal.[3]

Where a bankrupt has transferred his documents or any of them to another person before bankruptcy proceedings were instituted, such documents can not be recovered by the trustee until such transfer is shown to be fraudulent under the act.[4] Where such papers and documents may tend to incriminate a bankrupt it has been intimated that he will not be required to turn them over to his trustee.[5]

§ 155. Patents, copyrights and trade-marks.

All interests in patents, patent rights, copyrights and trade-marks pass to the trustee.[1] But the trustee takes no greater interest in these rights than the bankrupt had.[2] Under this

Jewett v. Preston, 27 Me. 400; Burton v. Lockert, 9 Ark 411; *In re* Schumpert, No. 12491 Fed. Cas., s. c. 8 N. B. R. 415.

[1] B. A. 1898, Sec. 70, clause 1.

[2] The act defines a document to "include any book, deed, or instrument in writing." B. A. 1898, Sec. 1, clause 13.

[3] See Century Dictionary, subject, Document.

[4] Rogers v. Winsor, No. 12023 Fed. Cas., 6 N. B. R. 246; *In re* West, 46 L. T. 823.

[5] *In re* Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559, s. c. 136 Fed. Rep. 988, 14 Am. B. R. 826.

[1] B. A. 1898, Sec. 70, clause 2.

As to the nature of creditor's remedies for reaching book royalties, see Lord v. Hart, 118 Mass. 271; Stephens v. Cady, 14 How. 531, 14 L. Ed. 528.

As to trade-marks, see Helmbold v. Helmbold Manufacturing Co., 53 How. Prac. 453; Warren v. Warren Thread Co., 134 Mass. 247; Sohier v. Johnson, 111 Mass. 238; Leather Cloth Co. v. Cloth Co., 11 H. L. 523; Kidd v. Johnson, 100 U. S. 617, 25 L. Ed. 769; Royal Baking Powder Co. v. Sherell, 93 N. Y. 334.

[2] *In re* McBride & Co., 132 Fed. Rep. 285, 12 Am. B. R. 81.

provision the interest of the bankrupt as a patentee, assignee or a licensee passes to his trustee in bankruptcy. The title passes by operation of law, and no instrument need be recorded in the patent office.[3] It is, however, proper for a trustee to record the order approving his bond in the patent office.

The trustee is not bound to take the interest of the bankrupt in the patents, copyrights or trade-marks if it is conceived to be worthless or would prove to be a burden or unprofitable.[4] If he declines to take the right it remains in the bankrupt.[5] If he elects to take it, the trustee may maintain a suit for infringement of the patent, copyright, or trade-marks in such courts as the bankrupt could have instituted it, but he is not obliged to bring such a suit.[5]

It has been held that the trustee is not entitled to patents issued after an adjudication, for which application had been made prior to the filing of the petition in bankruptcy.[6] It may be observed that in such cases the bankrupt owns an interest in the future patent which may be transferred before the patent issues.[7] It would therefore appear that the property in the patent should pass to the trustee under Sec. 70, clauses 2 or 5, of the act. If he elects to take it, he should record the order approving his bond in the patent office with a request that the patent issue to him as trustee.

Where an author has assigned his rights under a copyright absolutely, the interest in the copyright passes to the trustee of the assignee.[8] Where the contract between an author and

[3] Prime v. Brandon Manufacturing Co., No. 11421 Fed. Cas., 16 Blatch. 453. Compare Gordon v. Anthony, No. 5605 Fed. Cas., 16 Blatch. 453. Compare Ager v. Murray, 105 U. S. 131, 26 L. Ed. 942; Ashcroft v. Walworth, 580 Fed. Cas., 1 Holmes 132.

[4] Sessions v. Romadka, 145 U. S. 29, 36 L. Ed. 609.

[5] Kittle v. Hall, 29 Fed. Rep. 512, where the court said: "It can not be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and that his failure to do so is negligence."

[6] *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92; *In re* Dann, 129 Fed. Rep. 495, 12 Am. B. R. 27.

[7] R. S. Sec. 4895; Hendrie v. Sayles, 98 U. S. 546, 25 L. Ed. 176; Walker on Patents, Sec. 171.

[8] *In re* Howley-Dresser Co., 132 Fed. Rep. 1002, 13 Am. B. R. 94.

publisher for copyrighting, publishing and selling by the latter of books under a royalty, which contract expressly provided that it should not be transferred without the consent of the author, the trustee of the publisher can not sell as an asset this interest in the copyright, but should assign it to the author.[9]

§ 156. Powers of appointment, etc.

A power [1] is distinct from property. It is not an interest in property which can be transferred to another or sold on execution or devised by will; nor is it a chose in action. It was therefore held under the act of 1867 that a power of appointment did not pass to an assignee in bankruptcy of the person in whom the power resided.[2]

The act of 1898 expressly provides that powers which a bankrupt might have exercised for his own benefit pass to the trustee.[4] But those which he might have exercised for some other person do not pass.[3] The English bankrupt laws have for many years contained a similar provision.[4] The test of whether the power passes or not depends upon whether the power may be exercised by the bankrupt for his own benefit, or whether he can exercise it only in behalf of some other person. In the former case it passes to the trustee.[5] In the

[9] *In re* McBride, 132 Fed. Rep. 285, 12 Am. B. R. 81.

[1] As to powers generally, see Sugden on Powers; Chance on Powers; Farwell on Powers, 4 Kent's Com. 351, *et seq.*

[2] Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908.

[3] B. A. 1898, Sec. 70, clause 3.

[4] The statutes 13 Eliz., c. 7, s. 2, 21 Jac. 1 c. 19 s. 12, provided that every interest, power, or possibility which the bankrupt could have departed withal, or could have destroyed by recovery of fine, is transferred under the bankruptcy. And the bankruptcy act of 1869, 32 and 33 Vic. c. 71 s. 15, par. 4, enacted, and the act of 1883, 46 and 47 Vic. c. 52, s. 44, provides that the property of the bankrupt divisible among his creditors shall comprise (i i) "the capacity to exercise and to take proceedings for exercising all such powers in and over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge."

[5] Doe v. Britian, 2 B. & Ald. 93; Badham v. Mee, 7 Bing. 695; Coop-

latter case it does not. A power of general appointment may be exercised for the benefit of himself, and therefore passes.[6] But it seems that the appointment must be exercised prior to the death of the bankrupt.[7]

This provision in bankruptcy law is similar to a rule in equity. The trustee for this purpose represents the creditors. Mr. Justice Gray, in *Clapp* v. *Ingraham*,[8] said: "It was settled in the English court of chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate.[9] But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power when executed took effect as an appointment, not of the testator's own assests, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meager and imperfect reports have come to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money should be considered part of his assets, and his cred-

er v. Slight, 27 L. R. Chan. Div. 565; Ford v. Belmont, 7 Rob. (N. Y.) 97.

[6] Doe v. Britian, 2 B. &Ald. 93.

[7] Nichols v. Nixey, 29 L. R. Chan. Div. 1005; *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, 3 N. B. N. 143.

[8] 126 Mass. 201.

[9] Thompson v. Towne, Prec. Ch. 52; s. c. 2 Vern. 319.

itors should have the benefit of it.[10] The doctrine has been upheld to the full extent in England ever since." [11]

§ 157. Property fraudulently transferred by the bankrupt.

The bankrupt statute vests in the trustee and authorizes him to recover property fraudulently transferred.[1] A transfer, as defined by the act, includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."[2]

Transfers which are deemed fraudulent in bankruptcy may be classified as follows: *First,* those which, independently of any legislative system of bankruptcy, would have been fraudulent at common law, or under a statute of frauds.[3] *Second,* those which, in the absence of a legislative system of bankruptcy, would have been unobjectionable, but are made void by the bankrupt act, as against its manifest policy of equal and speedy distribution.[4] This distinction between conveyances and transfers involving moral turpitude and which are fraudulent in fact and preferential transfers where the fraud is constructive or technical is well recognized.[5]

Section 70*a*, clause 4, gives the trustee the title of the bank-

[10] Townshend v. Windham, 2 Ves. Sen. 1, 9, 10; *Ex parte* Caswall, 1 Atk. 559, 560; Bainton v. Ward, 7 Ves. 503, note; s. c. cited 2 Ves. Sen. 2, and Belt's Supplt. 243; 2 Atk. 172; Pack v. Bathurst, 3 Atk. 269.

[11] Chance on Powers, Chap. 15, Sec. 2; 2 Sugden on Powers (7th ed.), 27; Fleming v. Buchanan; DeG., M. & G. 976; *In re* Harvey's Estate, 13 L. R. Chan. Div. 216.

[1] B. A. 1898, Secs. 60, 67*e*. See 70*a*, clause 4, and see 70*e*, as amended by the act of Feb. 3, 1903, 32 Stat. at L. 797; B. A. 1898 Secs. 158, 159, 203 and 203*a*, *post.*

For a history and construction of these sections, see Judge Lowell's opinion, *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224.

[2] B. A. 1898, Sec. 1, clause 25.

[3] B. A. 1898, Sec. 70, clause 4, and Sec. 67*e;* see also Secs. 158, 160, 203 and 203*a*, *post.*

[4] B. A. 1898, Sec. 60 and 67*e*, par. 2; see also Secs. 159, 203 and 203*a*, *post.*

[5] *In re* Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re* Armstrong, 145 Fed. Rep. 202, 210, 16 Am. B. R. 583; Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224.

rupt to all property transferred by him in fraud of creditors, but this vesting of the trustee with certain rights and with a certain title was not intended to make absolutely void a transfer hitherto held to be only voidable. The other sections relating to property transferred in fraud of creditors provide that it may be recovered by the trustee, which plainly implies that, as against the trustee as against the creditor, the transferee's title is not void, but voidable—voidable at law as well as in equity, but still voidable. These transfers and the right of the trustee to avoid them are considered more at length in the next few sections.

§ 158. Transfers in fraud of creditors.

All property transferred by the bankrupt in fraud of his creditors vests in the trustee.[1] There is no four months' limitation on this class of transfers.[2]

This provision includes fraudulent conveyances, which are so by common law, by statute law and by any other recognized rule of law, other than the special provisions of the bankrupt statute.[3] They are for the most part made fraudulent and void by statutes founded upon the statute of 13 Elizabeth, chap. 5, enacted in 1570, and perpetuated in 29 Elizabeth, chap.

[1] B. A. 1898, Sec. 70, clause 4. Consult Sec. 157, *ante*, for the different clauses of fraudulent transfers, and Secs. 159 to 161 for further treatment of same.

[2] *In re* Gray (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 647.

[3] Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Pearsall v. Smith, 149 U. S. 231, 37 L. Ed. 713; Bradshaw v. Klein, No. 1790 Fed. Cas., 2 Biss. 20; Hyde v. Sontag, No. 6974 Fed. Cas., 1 Saw. 249; Allen v. Montgomery, 48 Miss. 101; Southard v. Benner, 72 N. Y. 424; Knowlton v. Moseley, 105 Mass. 136; Cady v. Whaling, No. 2285 Fed. Cas., 7 Biss. 430.

In Smith v. Ely, No. 13044 Fed. Cas., 10 N. B. R. 553, the court, speaking of the act of 1867, said: "Although no transfer made more than six months (four months under the present statute) before the filing of the petition can be made the ground of adjudicating the debtor a bankrupt, it in no sort follows that when the debtor has, upon lawful ground therefor, been decreed a bankrupt, the assignee can not impeach any conveyance and recover any property which, were there no bankrupt law, the creditors (having first obtained judgment) might impeach and recover on the ground that it was con-

5, passed in 1587.[4] This statute is merely a legislative declaration of the principles of the common law on this subject.[5] "It declared all gifts or conveyances of goods and chattels as well as of lands and tenements made in fraud of creditors to be void as against them."[6] Speaking of this statute, Judge Story observed that it has been "universally adopted in America as the basis of our jurisprudence on the subject."[7] It is not within the province of this work, however, to determine what conveyances are in fraud of creditors under the various statutes and recognized rules of law. The reader is referred to general works on that subject.[8]

An action to recover property fraudulently conveyed by the

veyed or transferred to defraud them. On the contrary, the 14th section expressly, and the general rules of equity with equal certainty, do permit it."

For transfers void under the bankrupt act if made within four months, see Secs. 159, 160 and 161, *post*.

[4] Although this statute of Elizabeth is usually referred to as the foundation statute for avoiding fraudulent conveyances, the same principles are to a greater or less extent embodied in earlier statutes. The act of 50 Edward III., Chap. 6 (1376) provided that "Divers people * * * do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster of St. Martinle-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenants and chattels as if no such gift had been made." See also statute of 2 Richard II., Chapter 3 (1379); 3 Henry VII., Chap. 4. (1487).

[5] In Cadogan v. Kennett, 2 Cowper, 434, Lord Mansfield said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes 13 El. c. 5 and 27 El. c. 4." The same rule is laid down in Clements v. Moore, 6 Wall. 312.

[6] Mr. Justice Gray, in Drake v. Rice, 130 Mass. 412.

[7] Story's Eq. Jur., Sec. 253.

[8] As to what constitutes such fraudulent conveyances generally, see Wait on Fraudulent Conveyances; Bump on Fraudulent Conveyances; Worthington on Fraudulent Conveyances.

bankrupt must be instituted by the trustee.[9] The trustee for this purpose represents the general or unsecured creditors. The fraudulent debtor has no right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties. By operation only of the express terms of the act the right which before the adjudication in bankruptcy belonged to the creditors was taken from them and given to the trustee.[10] When he asserts such rights he claims under them and not under the bankrupt.[10] The negligence or refusal of a trustee to bring a suit to set aside such a conveyance is not sufficient to entitle a creditor to maintain a suit in his own name.[11] The proper remedy in such a case is an application to the court to compel the trustee to take requisite steps for the full and complete protection of the rights of his creditors.[12]

Fraud is a necessary element to give the trustee in bankruptcy a right of action.[13] Insolvency of itself, or the fact that the property conveyed constituted more in value than the grantor could rightfully withdraw from the reach of creditors, does not vest such a right of action in the trustee.[14]

[9] As to where such suits may be prosecuted, see Sec. 203, *post*, and as to pleadings and procedure, see Sec. 203*a*, *post*. Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Allen & Co. v. Montgomery, 48 Miss. 101; *In re* Meyers, No. 9518 Fed. Cas., 2 Ben. 424; Thurmond v. Andrews, 10 Bush (Ky.) 400; *In re* Gray (N. Y.), 47 App. Div. 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore.), 70 Pac. Rep. 286.

[10] Crooks v. Stuart, 7 Fed. Rep. 800; Jones v. Smith, 38 Fed. Rep. 380; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668; *In re* Metzger, No. 9510 Fed Cas., 2 N. B. R. 355; Pratt v. Curtis, No. 11375 Fed. Cas., 2 Lowell 87.

[11] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; King v. Ditz, 12 Penn. St. 156; Lane v. Nickerson, 99 Ill. 284.

[12] See Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43.

[13] Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138; *In re* Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727.

[14] Warren v. Moody, 122 U. S. 133, 30 L. Ed. 1128; Adams v. Collier, 122 U. S. 382, 30 L. Ed. 1207; Metropolitan National Bank v. Rogers, 53 Fed. Rep. 776, s. c. 3 C. C. A. 666; *In re* Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727;

The statute provides that the transfer shall be in fraud of his creditors.[15]

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whomever may have received it, except a *bona fide* holder for value.[16]

It seems, therefore, that a trustee may pursue the property or proceeds of property to whomever may have received it until he reaches a *bona fide* purchaser.[17] Thus if A, in fraud of his creditors, transfers the property to B, who afterwards sells it to C, with notice, who afterwards sells it to D, a *bona fide* purchaser for value, the trustee in bankruptcy of A may hold C liable in damages for the value of the property. The trustee, however, has no greater rights in this respect than the creditors would have under the state laws.[18]

Where a fraudulent transferee and the trustee rescind the transaction and the transferee turns the property over to the trustee the trustee takes the title the bankrupt had and does not take as the grantee of the fraudulent transferee.[19]

When a fraudulent conveyance or transfer is set aside the court will order the property turned over to the trustee in

In re Toothaker Bros., 128 Fed. Rep. 187, 12 Am. B. R. 99.

[15] B. A. 1898, Sec. 70, clause 4.

[16] B. A. 1898, Sec. 70*e*; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138.

As to what constitutes a *bona fide* holder, see Marsh v. Armstrong, 20 Minn. 81; Murray v. Jones, 50 Ga. 109; Harrell v. Beal, 17 Wall. 590, 21 L. Ed. 692; Sedgwick v. Place, No. 12621 Fed. Cas., 12 Blatch. 163.

[17] Sedgwick v. Place, No. 12621 Fed. Cas., 12 Blatch. 163; *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224.

[18] *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224, 2 N. B. N. 701.

[19] *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

bankruptcy,[20] but will preserve rights under the local exemption laws.[21]

§ 159. Transfers to prefer creditors.

The act, as amended February 5, 1903, provides that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, made a transfer of any of his property, and the effect of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.[1] If a bankrupt shall have given a preference and the person receiving it, or to be bene-

[20] In Keating v. Keefer, No. 7635 Fed. Cas., 5 N. B. R. 133, the court said:

"The circumstances of this case are such as to force the conviction upon my mind that the transfers to defendant, and the placing of the title to the land in question in her name, were made and done with intent to hinder, delay and defraud not only the then existing creditors of Henry M. Keefer, but his future creditors also. A decree must be entered in accordance with the foregoing conclusions, and declaring the said farm, together with all the stock, grain and other personal property upon it, except such as the law excepts, assets of the said bankrupt, Henry M. Keefer, and subject to be disposed of and distributed under the bankrupt act for the payment of his debts and the expenses of the bankruptcy proceedings, and for delivery and surrender up to the complainant as assignee of the said bankrupt, of the possession of all said property, except as aforesaid, for the accounting by the defendant of all personal property on said farm at the time the bankruptcy proceedings were commenced (adjudication), sold, disposed of or converted by her, other than for the necessary keep of the live stock, and for the preservation of said property, and requiring the defendant to execute and deliver all conveyances, releases, assignments, transfers or acquittances necessary to carry said decree into full force and effect, and for costs to the complainant."

See also Sands v. Codwise, 4 Johns (N. Y.) 536.

[21] B. A. 1898, Sec. 70; McFarland v. Goodman, No. 8789 Fed. Cas., 6 Biss. 111; *In re* Detert, No. 3829 Fed. Cas., 11 N. B. R. 293.

[1] See Sec. 194d, *post*

fited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.[2]

Before the amendment the act made any transfer by an insolvent, the effect of which was to enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class, a preference, and allowed the trustee to avoid a preference made within four months of the filing of the petition if the person receiving it had reasonable cause to believe a preference was intended. Since the amendment the transfer must be made within four months of the filing of the petition in order to be a preference, and the trustee may avoid any preference if the person receiving it had reasonable cause to believe a preference was intended. In regard to the recovery of property by the trustee the effect is the same.

This provision evidently refers to property transferred to or for the benefit of a creditor for the purpose of creating a preference. Though a preference of creditors by a transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by the common law and is not forbidden by many of the states. It is, however, made invalid by the bankrupt act, providing three things concur.[3] *First,* At the time of the transfer the bankrupt must be insolvent.[4] A person is deemed insolvent within the provisions of this act whenever the aggregate of his prop-

[2] B. A. 1898, Sec. 60, 32 Stat. at L. 797. See Secs. 194 *et seq., post.*

[3] The section here under consideration corresponds with R. S. Sec. 5128, embracing a part of Sec. 35 of the act of 1867. The two sections differ in some particulars. For cases construing Sec. 35 of the act of 1867, see Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198; Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; West Phil. Bank v. Dickon, 95 U. S. 180, 24 L. Ed. 407; Mays v. Fritton, 20 Wall. 414, 22 L. Ed. 389; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; Judson v. The Courier Co., 8 Fed. Rep. 422.

[4] B. A. 1898, Sec. 1, clause 15; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R 449. See Sec. 194*a, post.*

erty, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. *Second,* The transfer must be made within four months before the filing of the petition.[5] *Third,* effect of the transfer must be to enable any creditor to obtain a greater percentage of his debt than other creditors of the same class.[6] *Fourth,* The person to be benefited must have had reasonable cause to believe that it was intended thereby to give a preference.[7] The existence of the required reasonable cause for belief may be inferred from the circumstances of the transaction.[8] When these things concur the trustee is entitlted to recover the property so transferred.

Every case of this kind must be decided, however, on its own facts and it will never be possible to lay down any general formula applicable to all cases. The intent to receive a preference necessarily involves the idea of an expectation of the debtor paying some others less than their whole debt.[9]

All levies, judgments, attachments or other liens, obtained through legal procedings within four months prior to the filing of the petition are void and the property so levied on passes to the trustee;[10] but where property levied on has been sold to an innocent purchaser for value, such purchaser

[5] See Sec. 194*d*, *post*; *In re* Kindt. 101 Fed. Rep. 107, 4 Am. B. R. 148.

[6] See Sec. 194*b*, *post*.

[7] See Sec. 194*c*, *post*.

[8] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449, 2 N. B. N. 390; *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220, 2 N. B. N. 890; *In re* Kenney, 97 Fed. Rep. 554, 3 Am. B. R. 353; Taft v. Fourth Nat. Bank (Sup. Ct. Cincinnati), 2 N. B. N. 1145; Hackney v. Raymond Bros. Co. (Neb.), 10 Am. B. R. 213; Stedman v. Bank, 117 Fed. Rep. 237, 9 Am. B. R. 4; Crittenden v. Barton (N. Y.), 5 Am. B. R. 775; Lyon v. Clark, 129 Mich. 381; *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 8 Am. B. R. 45; Brown v. Guichard (N. Y.), 7 Am. B. R. 515.

[9] For illustration of what constitutes a preferential transfer, consult Preferences, Chap. XVIII.

[10] B. A. 1898, Sec. 67*f*; *In re* Francis-Valentine Co., 93 Fed. Rep. 953, 2 Am. B. R. 188; Sec. 192, *post*.

has a good title. The proceeds of such sale go to the trustee and not to the judgment creditor.[11]

§ 160. Property transferred to hinder, delay or defraud creditors.

The bankrupt act provides "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings or otherwise for the benefit of the creditors." [1]

In order to avoid a transfer under this provision three things must concur. *First*, The debtor must have been adjudicated a bankrupt under the provisions of this act. *Second*, The transfer must have been made subsequent to the passage of the act and within four months prior to the filing of the petition. The day on which the transfer is made is excluded in computing the four months.[2] The date from which the four

[11] *In re* Kenney, 95 Fed. Rep. 427, 2 Am. B. R. 494; *in re* Franks, 95 Fed. Rep. 635, 2 Am. B. R. 634.

[1] B. A. 1898, Sec. 67*e*. This section corresponds to R. S. Sec. 5120, embracing a part of Sec. 35 of the act of 1867; Pollock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B. R. 616; *In re* Steininger Mercantile Co. (C. C. A. 5th Cir.), 107 Fed. Rep. 669, 6 Am B. R. 68; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278; Sherman v. Luckhardt (Sup. Kan.), 11 Am. B. R. 26, overruling 9 Am. B. R. 312, 65 Kan. 610.

[2] B. A. 1898, Sec. 31; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R 499; Dutcher v. Wright, 94 U. S. 533, 24 L. Ed. 130.

months begins to run is the date the transfer was actually made and not the date when the deed or mortgage was recorded. This is the general rule which was applied to preference prior to the amendment of 1903 fixing the date of recording.[3] *Third,* The existence of an intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, or any of them. If any of these elements are wanting the transfer can not be avoided under this provision.

The transfer of property "with intent to hinder, delay and defraud creditors," as used in the bankrupt act, is none other than the like fraudulent transfer made void by Stat. 13 Eliz., which is itself simply declaratory of the common law and should have the same construction and effect as have for a long period of time been attributed to these words.[4] The test of the transfer intended by this section is that of the *bona fides* of the transfer.[5] If the transfer is one which would be fraudulent at common law it may be avoided by the trustee.[6] That is to say, the transaction must involve actual fraud involving moral turpitude. Transfers made in good faith, for an antecedent or present consideration, are not within this provision notwithstanding the effect may be that it hinders or delays

[3] See Sec. 194*d*, *post*. Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Rogers v. Page (C. C. A. 6th Cir.), 140 Fed. Rep. 596, 15 Am. B. R. 502; Little v. Holly-Brooks Hardware Co. (C. C. A. 5th Cir.), 133 Fed. Rep. 874, 13 Am. B. R. 422.

See also Wood v. Owings, 1 Cranch, 239, 2 L. Ed. 94, where a deed signed, sealed and delivered May 30, 1800, and acknowledged June 14, 1800, was held to have been made before the act of 1800 took effect, which was on June 1, 1800.

[4] Lansing Boiler & Eng. Wks. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453.

[5] Lansing Boiler & Eng. Wks. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; *In re* Bloch (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 15 Am. B. R. 748.

In Cadogan v. Kennett, 2 Cowper 435, Lord Mansfield said: "The question therefore in every case is whether the act done is a *bona fide* transaction or whether it is a trick or contrivance to defeat creditors."

[6] *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; *In re* Benjamin, 140 Fed. Rep. 320, 15 Am. B. R. 351; Wallbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R.

creditors by removing from their reach assets of the debtor.[7] Such a transfer may be preferential without being fraudulent.[8]

The intent to defraud is essential to a fraudulent transfer under Section 67*e*. An intent to prefer is not sufficient.[9] The purpose must be to defraud the entire body of creditors. The conversion of the property of a single creditor is not sufficient.[10] The intent of the bankrupt only is essential.[11] This may be determined from the circumstances connected with the transaction, because a person is presumed to intend the necessary consequence of his acts.[12] The issue as to whether or not a bankrupt had made a transfer of his property with intent on his part to hinder, delay or defraud his creditors is a question for the jury.[13] The intent of the transferee is immaterial, but he must be shown to have knowledge of or have participated in the fraud.[14] The fact that he had reasonable cause to inquire into the nature of the transaction is sufficient, although he may not have had actual knowledge of the fraud involved in the transaction.[15]

432, s. c. 146 Fed. Rep. 109; Johnston v. Forsyth, 127 Fed. Rep. 845, 11 Am. B. R. 669.

[7] Lansing Boiler & Eng. Wks. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558; Jacobs v. Van Sickle (C. C. A. 3d Cir.), 127 Fed. Rep. 62, 11 Am. B. R. 470; *In re* Duffey, 118 Fed. Rep. 926, 9 Am. B. R. 358; Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re* Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re* Armstrong, 145 Fed. Rep. 202, 16 Am. B. R. 583.

[8] Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re* Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re* Armstrong, 145 Fed. Rep. 202, 16 Am. B. R. 583.

[9] Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re* Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re* Armstrong, 145 Fed. Rep. 202, 16 Am. B. R. 583.

[10] *In re* Berry & Co., 146 Fed. Rep. 623, 15 Am. B. R. 360.

[11] *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245; *In re* Bloch (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 15 Am. B. R. 748.

[12] Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; *in re* Knopf, 146 Fed. Rep. 109; *In re* Benjamin, 140 Fed. Rep. 320, 15 Am. B. R. 351.

[13] Sherman v. Luckhardt, 96 Mo. App. 320, 9 Am. B. R. 307.

[14] Jacobs v. Van Sickle (C. C. A. 3d Cir.), 127 Fed. Rep. 62, 11 Am. B. R. 470.

[15] Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; *In re* Moody, 134 Fed. Rep. 628, 14 Am. B. R.

Transfers made in good faith for a present fair consideration and transfers of property exempt from execution and liability for debts by the law of the debtor's domicile can not be avoided under this provision. They are expressly excluded in terms. The object of this provision is not to reach property honestly sold for a fair price. It should be observed that though a present fair consideration was given for property transferred to hinder, delay or defraud creditors, it alone will not save the conveyance. A sale may be void for bad faith though the buyer pays the full value for the property bought.[16] This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors and where he buys perpetrating a fraud upon his creditors and where he buys recklessly with guilty knowledge.[17] Where a fraudulent transfer is alleged and a purchaser claims that the purchase was made in good faith for a present fair consideration, the burden is upon him to establish that fact to bring him within the protection of this section.[18]

An attaching creditor can not be deemed a purchaser in good faith for value. But where property conveyed in fraud of creditors is first attached by creditors of the transferee who have no knowledge of the fraud, their attachment will prevail as against the rights of the defrauded creditors of the grantor, or his trustee in bankruptcy.[19] This ruling was made in a case arising under Section 70*e*. In view of the construction placed upon Section 67*e* the result would be the same were the transfer made with intent to hinder, delay or defraud creditors.

272; *In re* Knopf, 146 Fed. Rep. 109; Dokken v. Page (C. C. A. 8th Cir.), 147 Fed. Rep. 438.

[16] *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66.

[17] *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; Clements v. Moore, 6 Wall. 312; Cadogan v. Kennett, 2 Cowper 432; Walbrun v. Babbitt, 16 Wall. 581, 21 L. Ed. 489.

[18] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; McNulty v. Wiesen, 130 Fed. Rep. 1012, 12 Am. B. R. 341; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re* Moody, 134 Fed. Rep. 628, 14 Am. B. R. 272; Dokken v. Page (C. C. A. 8th Cir.), 147 Fed. Rep 438.

[19] *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224.

A transfer fraudulent under the statute of frauds may be set aside under this section if made within the time specified,[20] as well as under the provisions relating to transfers in fraud of creditors.[21]

§ 161. Transfers void as to creditors under state laws.

The bankrupt act provides that "All conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.[1]

By this provision congress has adopted the state laws for the purpose of determining whether a transfer is void as against creditors. The provision is not confined to any particular class of transfers. Any conveyance or transfer of his property made by a bankrupt within four months before the filing of the petition may be held null and void as against the creditors of the bankrupt, provided it could have been set aside by the creditors under the local law. The failure to register or properly record a deed or bill of sale or mortgage, as required by the local statute,[2] or to give possession of

[20] Andrews v. Graves, No. 376 Fed. Cas., 1 Dill. 108.

[21] B. A. 1898, Sec 70*e*. See also Sec. 158, *ante*.

[1] B. A. 1898, Sec. 67*e*.

[2] *In re* Leigh, 96 Fed. Rep. 806; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302. See Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Bank v. Hunt, 11 Wall. 391, 20 L. Ed. 190; *In re* Leland, 10 Blatch. 503, No. 8234 Fed. Cas.; *In re* Wynne, 4 N. B. R. 23, No. 18117 Fed. Cas.; Allen v. Massey, 4 N. B. R. 231, No. 231 Fed. Cas. and 17 Wall. 352, 21 L. Ed. 542; Harvey v. Crane, 5 N. B. R. 218, No. 6178 Fed. Cas., and see note; Edmonson v. Hyde, 2 Saw. 205, No. 4285 Fed. Cas.

personal property,[3] are familiar examples. In most states such a transfer is valid between the parties, but may be avoided where rights of creditors are concerned. In such case the trustees in bankruptcy may recover for the creditor's property so transferred, provided there has been an adjudication of bankruptcy.

Adopting the state laws as a rule of decision does not violate the constitutional provision with reference to uniformity. The uniformity required relates to the national legislation only. It is well settled that the laws of the several states regulating exemptions may be left in force so long and to such an extent as congress may see fit.[4] The same reasoning may be applied to state statutes relating to the rights of creditors.

§ 162. Real and personal property.

The title to all property which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, passes to the trustee.[1]

The test as to whether property is of such a character as to pass or not depends upon whether, under the local law where the property has its situs, the bankrupt could have transferred it, or whether it could have been levied upon and sold under judicial process against him. If it is of such a character it passes. If not, it does not pass to the trustee. Such questions are determinable only by local law where the property has its situs.[2] The situs of real property is the state in which

[3] *In re* Taylor, 95 Fed. Rep. 956; Spencer v. Duplan Silk Co., 112 Fed. Rep. 638, 7 Am. B. R. 563, reversed (C. C. A. 3d Cir.), 8 Am. B. R. 367, 115 Fed Rep. 689, s. c. 191 U. S. 526, 48 L. Ed. 287; *In re* Portuondo Co., 135 Fed. Rep. 592, 14 Am. B. R. 337.

[4] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed. Cas., 1 Dill. 45; *In re* Jordan, No. 7514 Fed. Cas., 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., 16 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., 2 Hughes, 322.

[1] B. A. 1898, Sec. 70, clause 5; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

[2] Spindle v. Shreve, 111 U. S. 546, 28 L. Ed. 512, Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Mason

it is situated.[3] The situs of personal property is the domicile of the bankrupt.[3]

The effect of this provision is to transfer the greater part of the assets of the bankrupt. They include a large number of different classes of property, which will be more particularly discussed under separate heads.

§ 163. Interest in real estate.

The title to all real estate within the United States held by the bankrupt at the time of filing the petition is vested in the trustee.[1] But as a title vested by law can have no extra territorial operations, lands situated in foreign countries do not pass except by deed.[1] The bankrupt should therefore execute a transfer of his real estate situated in foreign countries.[2]

Any interest in real estate which is alienable or subject to levy and execution passes to the trustee. Thus it has been held that an equity of redemption,[3] property devised,[4] a vested remainder,[5] a reversion with rent incident thereto,[6] a

v. Beebee, 44 Fed. Rep. 558; *in re* McKenna, 9 Fed. Rep. 27. See also Nichols v. Eaton, 91 U. S. 729, 23 L. Ed. 254, Raynolds v. Hanna, 55 Fed. Rep. 795.

[3] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593. See also *In re* Bugbee, No. 2115 Fed. Cas., 9 N. B. R. 258.

[1] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Pool, 23 Tex. 517.

[2] B. A. 1898, Sec. 7, clause 5.

[3] Barron v. Newberry, No. 1056 Fed. Cas., 1 Biss. 149; Robinson v. Denny, 57 Ala. 492. See also 4 Kent's Com. 160; *Ex parte* Ames, No. 323 Fed. Cas., 1 How. 561; *In re* Novak, 111 Fed. Rep. 161, 7 Am. B. R. 27.

[4] Sanford v. Lackland, No. 12312 Fed. Cas., 2 Dill. 6; *Ex parte* Fuller, No. 5147 Fed. Cas., 2 Story 327.

[5] *In re* Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572, 3 N. B. N. 141; *In re* Twaddell, 110 Fed. Rep. 145, 6 Am. B. R. 539; *In re* Shenberger, 102 Fed. Rep. 978, 4 Am. B. R. 487; *In re* McHarry (C. C. A. 7th Cir.), 111 Fed. Rep. 498, 7 Am. B. R. 83; Belcher v. Burnett, 126 Mass. 230; Woods v. Little (C. C. A. 4th Cir.), 13 Am. B. R. 742, 134 Fed. Rep. 229; see also Putnam v. Story, 132 Mass. 205.

[6] Evans v. Hamrick & Co., 61 Penn. St. 19.

fee subject to an easement,[7] accretions to land by alluvion,[8] an estate of the husband by courtesy or dower,[9] a resulting trust,,[10] or an equitable title conveyed to bankrupt subject to a trust imposed by a will,[11] or any vested interest,[12] is such property as vests in a trustee. It has been held on the other hand that a contingent interest in an estate in remainder,[13] the income of a life estate under a will,[14] or Indian lands under an allotment act of congress[15] do not pass to the trustee. Whether an equitable interest in real estate will pass to a trustee depends upon the local law where the property has its situs.[16]

The trustee of a bankrupt mortgager is ordinarily entitled to take as a part of the estate the rents for mortgaged property which comes into his possession accrued up to the time that the mortgagee enters and brings his right of entry or his bill of foreclosure, or takes such action as entitles him to possession of the property.[17]

§ 164. Dower and curtesy.

Real estate of the bankrupt passes to the trustee subject to his wife's right of dower. A right of dower by a wife is no part of the bankrupt's property, and it can not be barred by

[7] Banks v. Ogden, 2 Wall. 57, 17 L. Ed. 818.

[8] Banks v. Ogden, 2 Wall. 57, 17 L. Ed. 818.

[9] *In re* McKenna, 9 Fed. Rep. 27; Hesseltine v. Prince, 95 Fed. Rep. 802, 802, 2 Am. B. R. 600.

[10] *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41.

[11] *In re* Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 11 Am. B. R. 539.

[12] *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268.

[13] *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, 3 N. B. N. 143, affirmed (C. C. A. 3d Cir.), 108 Fed. Rep. 520; *In re* Hoadley, 2 N. B. N. 704.

[14] Monroe v. Dewey (Mass.), 2 N. B. N. 840. But see *In re* Baudouine, 96 Fed. Rep. 536, 3 Am. B. R. 55; *In re* St. John, 105 Fed. Rep. 234, 5 Am. B. R. 190, 3 N. B. N. 114.

[15] *In re* Russie, 96 Fed. Rep. 609, 3 Am. B. R. 6.

[16] Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512; *In re* Goldman, 102 Fed. Rep. 122, 4 Am. B. R. 100, 2 N. B. N. 818.

[17] *In re* Dole, 110 Fed. Rep. 926, 7 Am. B. R. 21; *In re* Chase, 133 Fed. Rep. 79, 13 Am. B. R. 294.

a sale by the trustee in bankruptcy under order of the court.[1] The same rule is applied in England.[2]

The present statute recognizes this right of the widow when it provides that in case of the death of the bankrupt the widow and children shall be entitled to all rights of dower and allowance allowed by the law of the state of the bankrupt's residence.[3] The wife is not estopped to claim dower by reason of having joined her husband in a deed which is fraudulent as against creditors, and which for this reason has been set aside by the trustee.[4] In what property the wife has a right of dower and the nature of the dower depends upon the local law. Where the local law gives a wife dower in property "whereof the husband died seized and possessed," it has been held that the widow is not entitled to dower in property which has passed to her husband's trustee by virtue of bankruptcy before his death.[5] The wife of a bankrupt has no inchoate right of dower in real estate which has vested in a trustee as assets of a partnership.[6]

An estate by curtesy in a wife's property does not pass to the trustee of her husband during her life.[7] The wife's right of dower in her husband's estate does not pass to her trustee during the life of the husband.[8]

[1] Porter v. Lazear, 109 U. S. 84. 27 L. Ed. 865; *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Slack, 111 Fed. Rep. 523, 7 Am. B. R. 121; *In re* Angier, No. 388 Fed. Cas., 4 Am. B. R. 619; *In re* Hester, No. 6437 Fed. Cas., 5 N. B. R. 285. But see Hill v. Bowers, 4 Heisk. (Tenn.) 272; Bostick v. Jordan, 7 Tenn. 370.

[2] Smith v. Smith, 5 Ves. 189; Squire v. Compton, Vin. Ab. Dower G. pl. 60.

[3] B. A. 1898, Sec. 8.

[4] Cox v. Wilder, No. 3308 Fed. Cas., 2 Dill. 45; *In re* Detert, No. 3829 Fed. Cas., 11 N. B. R. 293; McFarland & Goodman, No. 8789 Fed. Cas., 6 Biss. 111.

[5] *In re* McKenzie, 132 Fed. Rep. 986, 13 Am. B. R. 227; affirmed (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 15 Am. B. R. 679.

[6] Hiscock v. Jaycox, No. 6531 Fed. Cas., 12 N. B. R. 507.

[7] Hesseltine v. Prince, 95 Fed. Rep. 802, 2 Am. B. R. 600; *In re* McKenna, 9 Fed. Rep. 27.

[8] *In re* German American Bank ((Southern District of Ohio, 1905, not reported).

§ 165. Leaseholds.

A lease which may be transferred by a bankrupt or levied upon and sold under judicial process against him prior to the filing of the petition, is not terminated by bankruptcy but passes to the trustee.[9] Although the legal title passes, the trustee is not bound to take the lease and charge the estate with the payment of rent. He may elect not to take the lease when it would be a burden and not a benefit to the estate on the ground that it is onerous property.[10]

Under the statute of 1867 a landlord was not entitled to prove a debt for rent accruing subsequent to the filing of the

[9] *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564, 2 N. B. N. 360, Judge Lowell said: "A lease recently examined was made for a term of several hundred years, upon a payment of $16,000 at the beginning of the term, and subject to a future rent of $1 a year if demanded by the lessor. Clearly, this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankrupt act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication."

See also *In re* Bush, 126 Fed. Rep. 878, 11 Am. B. R. 415; *In re* Adams, 134 Fed. Rep. 142, 14 Am. B. R. 23; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246, 2 N. B. N. 106; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 9 Am. B. R. 490; Lamson, etc., Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; Atkins v. Wilcox (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 5 Am. B. R. 313. *Contra, In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Hays, etc., Co., 117 Fed. Rep. 879, 9 Am. B. R. 144.

[10] See Trustee not bound to take encumbered interest, Sec. 151, and Rent, Sec. 120.

In re Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; *Ex parte* Whitman, not reported, but referred to by Judge Ware in Smith v. Gordon, No. 13052 Fed. Cas., 6 Law Rep. 313; *In re* Ten Eyck, No. 13829 Fed. Cas., 7 N. B. R. 26; Turner v. Richardson, 7 East's Reports 336; Welch v. Myers, 4 Campbell 368; Thomas v. Pemberton and Kittredge, 7 Taunt. 205; Ansell v. Robson, 2 Crompton & Jervis, 610; Clark v. Hume, Ryan & Moody's Reports, 207; Page v. Godden, 2 Starkie, 309; Hastings v. Wilson, Holt, 290; Wheeler v. Bramah, 3 Campbell 340; Hill v. Dobie, 2 Moore 342; Hill v. Dobie, 8 Taunt. 325; Hanson v. Stevenson, 1 Barnewall & Alderson 303; Carter v. Warne, 4 Carrington & Payne 191; Goodwin v. Noble, 8 Ellis & Blackburn 587.

petition.[11] But it was held that if the assignee in bankruptcy continue to occupy the leased premises that he was bound to pay rent for the time he actually used them.[12] Such rent was considered a provable debt as expenses of administration.[12] This rule has been applied under the present act.[13]

Under the act of 1841 leases passed to a trustee, subject to his election to take or reject them.[14] In England leases have passed to a trustee or assignee under the earlier acts, subject to an election to take or refuse them.[15] Since the act of 1869 (32 and 33 Vic.) leases have passed subject to a statutory disclaimer, and no power of election has been recognized.[15] It is

[11] R. S. Sec. 5071; *In re* Webb, No. 17315 Fed. Cas., 6 N. B. R. 302; *In re* Huffnagel, No. 6837, 12 N. B. R. 554; *In re* Butler, No. 2236 Fed. Cas., 6 N. B. R. 501.

[12] *In re* Huffnagel, No. 6837 Fed. Cas., 12 N. B. R. 554; *In re* Dunham, No. 4145 Fed. Cas., 27 Leg. Int. 404; Buckner v. Jewell, No. 3060 Fed. Cas., 2 Woods 220; *In re* McGrath, No. 8808 Fed. Cas., 5 Ben. 183; *In re* Walton, No. 17131 Fed. Cas., 1 N. B. R. 557; *In re* Appold, No. 499 Fed. Cas., 1 N. B. R. 621; *In re* Hamburger, No. 5975 Fed. Cas., 12 N. B. R. 277; *In re* Ives, No. 7116 Fed Cas., 18 N. B. R. 28; *In re* Yeaton, No. 18133 Fed. Cas., 1 Low. 420. See Rent. Sec. 120, *ante*.

[13] *In re* Chambers, Calder & Co., 98 Fed. Rep. 865, 3 Am. B. R. 537, 2 N. B. N. 388; Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730.

[14] *Ex parte* Whitman, not reported, but referred to by Judge Ware, in Smith v. Gordon, No. 13052 Fed. Cas., 6 Law Rep. 313.

[15] See Robson on Bankruptcy, 460, *et seq.*

In Wilson v. Wallani, 5 Ex. Div. 155, Judge Stephen reviews the English statutes upon this point, and reaches the conclusion on page 163 as follows: "I think that under the first act of bankruptcy laws —those which were consolidated in 1824—the power of the trustees to renounce onerous leases arose from the absence of any legal enactment citing such leases in them, and from the insufficiency for that purpose (as explained in Copeland v. Stephens, 1 B. & A. 393) of a general assignment. Under the second set of bankruptcy laws, including the act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of s. 145 of the act of 1849. This act was repealed by 32 and 33 Vict. c. 83. Under the third system established by the act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognized in him. It thus appears to me that the power of election conferred by the act of

therefore evident that cases decided prior to the act of 1869 may be useful in construing the act of 1898 in this respect.

Assuming that a leasehold estate vests under the act of 1898 in the trustee, subject to his election to take or reject it, the first inquiry is what is necessary to constitute such election? The safer practice is for the trustee to immediately serve a written notice upon the lessor stating his election. If he elects not to take he may make a new lease with the same landlord with reference to using the premises as may be for the best interests of the bankrupt's estate.

When the trustee does not give a notice of his election in writing his intention may be presumed from his acts. No general rule can be laid down as to the effect of remaining in possession of the leased premises, or paying rent for them, or doing any other act consistent with the supposition that the trustee has not elected to take the lease as a part of the property of the bankrupt. Each case must be determined by the particular circumstances belonging to it, and the examination of the decisions is only useful to get at the general principle by which they are governed. Thus, ordinarily, if he takes any steps toward the management of or continues to use the leased premises, he may be presumed to have elected to take the lease.[16]

1849, being repealed by express words, and the estate being vested in the trustee by the express words of the act of 1869, he has no power to get rid of it, except by following the express words of s. 23. I do not think this view is inconsistent with the cases to which I have referred. They show only that the provisions of the act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole, I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *Ex parte* Dressler (9 Ch. D. 252) is an express authority as to their personal liability, assuming the lease to be vested in them absolutely." In this case he held that the disclaimer was not formal, and therefore not binding. See also Titterton v. Cooper, 9 L. R. Q. B. Div. 473.

The act of 1883, enacted since this decision, also provides for formal disclaimer.

[16] It has been held that it amounts to an election for the trustee to in-

He must make an election within a reasonable time.[17] If he fails to do this, or refuses when requested, he is deemed to have elected not to take the lease, and it remains in the bankrupt.[18]

termeddle with and assume the management of a farm. Thomas v. Pemberton, 7 Taunt. 206 Bradshaw v. Jones, 20 L. T. 781, s. c. W. R. 1010; or where the trustee allowed his cows to remain upon the pasture land for two days after appointment and ordered them to be milked there, Welch v. Myers, 4 Camp. 368, or where he pays rent for leased property, Ansell v. Robson, 2 C. & J. 610; also Broome v. Robinson, 7 East 339. Where the trustee takes possession of leasehold property, although the trustee delivered up the keys immediately after the bankrupt's effects are sold, Hansen v. Stevenson, 1 B. & A. 303; or where the trustee of a bankrupt lessee chosen on the 15th of November kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, although on the 23d of December he disclaimed the lease by letter to the landlord, Clark v. Hume, R. & M. 207; or where the trustee assigns the lease to the owner as security for advances, Mackey v. Pattendon, 30 L. J. Q. B. 225, s. c. 4 L. T. 285; or where the trustees so act as to make the property of less value, Carter v. Warne, 4 C. & P. 191; or where the trustees sell a bankrupt's estate and reversionary interest in the premises, Page v. Godden, 2 Stark, 309. See also Hastings v. Wilson, Holt, 290.

But it was held not to be an election to take where the trustees of a bankrupt having allowed his effects to remain on the premises occupied by him nearly twelve months after the bankruptcy and paid the arrears of the rent due, at the same time intimating to the landlord that they did not mean to take the land unless it could be advantageously disposed of; effects were soon after sold and removed from the premises; the land was put up for sale by order of the trustees, but there were no bidders; they omitted to return the key to the landlord for nearly four months after, Wheeler v. Bramah, 3 Camp. 340; or where the trustee of a bankrupt lessee of a hotel, upon the bankruptcy, closed the hotel with the exception of the bar, which was occupied by a third party, tenant to the bankrupt before bankruptcy, and he was supplied by order of the trustee with liquor at a slight advance over cost price, Goodwin v. Noble, 27 L. J. Q. B. 204, s. c. 8 El. & Bl. 587; or where trustees were possessed of a farm, part of which he had under-let to another, released such under-tenant, being afterwards asked by the lessor to elect, refused to take the original lease, Hill v. Dobie, 2 Moore, 342, s. c. 8 Taunt. 325. Trustees may likewise do reasonable acts to ascertain the value of property by putting up farms to sell. See Turner v. Richardson, 7 East. 336; Hastings v. Wilson, Holt, 290.

[17] Clark v. Hume, R. & M. 207.

[18] See Sparhawk v. Yerkes, 142

Where the trustee elects to take the lease he takes it subject to equities.[19] He thereby makes the estate and himself personally liable for the payment of rent for the full term of the lease or until it passes by assignment to another person.[20] He may relieve himself of liability by surrendering the lease to the lessor or assigning it to a third party, who may be a pauper.[21] The reason for this rule is that the trustee holds in privity of estate only, not in privity of contract, between himself and the landlord, which is the sole basis of his liability. If this is taken away by assignment it destroys the privity, and hence the liability.

Following the English decisions a trustee will not be allowed to sell off crops, manure, hay or straw,[22] or to remove fixtures [23] contrary to the terms of the lease.

The benefit of a contract or option for a lease to which the bankrupt is entitled will also probably vest in the trustee, and may be assigned by him,[24] or he may decline to take such contract.[25] Where the trustee elects to take such contract or option the lessor will not be bound to grant a lease to him, unless he enters into the same covenants as the bankrupt must have entered into if solvent.[26] It may be that the trustee can

U. S. 1, 35 L. Ed. 915; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052 Fed. Cas., 6 L. R. 313.

[19] *Ex parte* Faxon, No. 4704 Fed. Cas., 1 Low. 404. See McFarland Carriage Co. v. Solanes, 108 Fed. Rep. 532, 6 Am. B. R. 221.

[20] Hansen v. Stevenson, 1 B. & A. 307; Thomas v. Pemberton, 7 Taunt. 205; Welch v. Myers, 4 Camp. 368; Ansell v. Robson, 2 C. & J. 610; Carter v. Warne, 4 Car. & P. 191; Hastings v. Wilson, Holt, 290.

In Clark v. Hume, R. & M. 207, a trustee in bankruptcy was held personally liable.

[21] Hopkinson v. Lovering, 11 L. R. Q. B. Div. 92. As to the right to pursue a bankrupt after bankruptcy proceedings in an action of covenant, see Auriol v. Mills, 4 T. R. 60.

[22] *Ex parte* Maundrell, 2 Mad. 315; *Ex parte* Whittington, Buck. 87.

[23] See Stansfield v. Portsmouth, 4 C. B. N. S. 120, 4 Jur. N. S. 440; Saint v. Pilley, L. R. 10 Ex. 137, s. c. 33 L. T. 93.

[24] Buckland v. Papillon, 1 L. R. Eq. 477; Crosbie v. Tooke, 1 M. & K. 421; Morgan v. Rhodes, 1 M. & K. 435.

[25] *Ex parte* Blake, 11 Chan. Div. 572; *Ex parte*, Llynvi Coal Co., 7 Chan. App. 28.

[26] Powell v. Lloyd, 1 Y. & J. 427, s. c. 2 Y. & J. 372; Page v. Broom, 3 Beav. 36.

not assign the benefit of such a contract so as to entitle the assignee of it to a lease without a stipulation to that effect.[27]

The acceptance or rejection of the lease by the trustee will not release from liability a surety for the lessee.[28] The surety will continue liable for breaches of covenant committed before the lease is surrendered.

A trustee has no greater rights under a lease than the lessee. A landlord may reenter and terminate a lease containing such a covenant,[29] or may enforce a lien for rent under a state law.[30]

It has been held that, where a lease prohibited an assignment by the lessee or that "his interest herein shall be sold under execution or other legal process," a sale by the trustee of the lessor of the interest the trustee holds for the benefit of the estate is not a breach of either condition of the lease.[31]

§ 166. Growing crops, fixtures and good-will.

Growing crops which are annually produced by the cultivator are considered emblements, and before their severance from the soil pass to the trustee as personal property.[1] But

[27] See Dowell v. Dew, 1 W. & C. Chan. 365; Buckland v. Papillon, 1 L. R. Eq. 477; Weatherall v. Geering, 12 Ves. 504.

[28] B. A. 1898, Sec. 16; Inglis v. McDougal, 1 J. B. Moore 196; Tuck v. Fyson, 6 Bing. 321.

[29] *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564, 2 N. B. N. 360; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246, 2 N. B. N. 106.

[30] McFarland Carriage Co. v. Solanes, 108 Fed. Rep. 532, 6 Am. B. R. 221; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

[31] In Gazlay v. Williams, trustee (C. C. A. 6th Cir.), 148 Fed Rep. —, 17 Am. B. R. —, the court said: "And a consideration of the language of the condition shows that a sale by appellee [trustee] of the leasehold estate is not within its terms. It is not within the voluntary branch thereof, because if it may be said to be a voluntary assignment, it is not an assignment by said 'lessee.' It is not within the involuntary branch thereof, for though it may be said to be an involuntary assignment and, possibly, also a sale under legal process, it is not a sale of 'said lessee's interest.' It is a sale of the appellee's [trustee's] interest held by it for the benefit of creditors and which passed to it notwithstanding the condition, by virtue of the bankruptcy proceeding."

[1] *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95; *In re* Daubner, 96 Fed. Rep. 805, 3 Am. B. R. 368; *In re* Coff-

where the crop is gathered after an adjudication by the bankrupt he should be allowed a reasonable compensation for work and care from the date of adjudication.[2] They do not pass where a mortgagee is entitled to possession and demands it in pursuance of the terms of his mortgage,[3] or where the bankrupt has parted with his interest in the crops,[4] or where the crop is planted by a bankrupt after the filing of a petition in bankruptcy.[5]

Where the terms of the lease permit a tenant to remove fixtures the trustee succeeds to his right,[6] but otherwise not.[7] The general rule with reference to tenants is, that after the expiration of his tenancy he has no right to remove fixtures which he might have removed during his lease,[8] but that they become the property of the landlord.[9]

Where goodwill is local, and not of a personal nature, it will pass to the trustee.[10] The reason for this exception may be readily understood when it is considered that the whole value of a good-will may be inseparable from personal professional skill, as, for example, that of a surgeon or lawyer, such being very different in nature from a commercial matter.[11]

man, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re* Rooney, 109 Fed. Rep. 601, 6 Am. B. R. 478; *In re* Schumpert, No. 12491 Fed. Cas., s. c. 8 N. B. R. 415; *Ex parte* National Mercantile Bank, 16 Chan. Div. 104.

[2] *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95.

[3] Bagnall v. Villar, 12 Chan. Div. 812.

[4] Consult *In re* Gregg, No. 5796 Fed. Cas., 1 Hask. 173.

[5] *In re* Barnett, No. 1024 Fed. Cas., 3 Pitts. Rep. 559.

[6] See *In re* Breck, No. 1822 Fed. Cas., 8 Ben. 93; Stansfeld v. Portsmouth, 4 C. B. Rep. N. S. 118.

[7] *Ex parte* Ames, No. 323 Fed. Cas., s. c. 1 Low. 561; *Ex parte* Thomas, 44 L. T. 781, 29 W. R. 527; *Ex parte* Morrow, No. 9850 Fed. Cas., 1 Low. 386.

[8] See Lyde v. Russell, 1 B. & Ad. 394; Pugh v. Arton, L. R. 8 Eq. 626. See also and compare McIntosh v. Trotter, 3 M. & W. 184; Weaton v. Woodcock, 7 M. & W. 14.

[9] See *In re* Thomas, 29 W. R. 527, 44 L. T. 781.

[10] *See Ex parte* Punnett, 16 Chan. Div. 226; *Ex parte* Thomas, 2 Mont. D. & DeG. 294, 10 L. J. Bankruptcy, 75.

[11] See Farr v. Pearce, 3 Madd. 74.

§ 167. Goods and chattels generally.

All the personal estate, merchandise, stocks, bonds, notes, money, plate, furniture, etc., so as to include every sort of personal property, except such as is exempt by the state law, passes to and vests in the trustee.

Personal property belonging to the bankrupt, which is in the possession of his agents or factors, is considered in his possession, and accordingly passes to the trustee. Thus, grain in a warehouse has been held to vest in a trustee.[1] But goods in a United States bonded warehouse, on which the duties have not been paid, for they are in the possession of the United States, were held not to pass.[2] Legacies or personal property inherited prior to filing the petition pass to the trustee,[3] but such property inherited after that date does not pass to the trustee.[4]

Where a stock of goods was transferred for the purpose of defrauding creditors of a firm and was subsequently retransferred to the bankrupts, the property was held to pass to the trustee.[5]

[1] Brook v. Scoggins, No. 1936 Fed. Cas., 11 N. B. R. 258.

[2] *In re* Clifford, No. 2893 Fed. Cas., 2 Saw. 428.

[3] *In re* Stoner, 105 Fed. Rep. 752, 5 Am. B. R. 402, 3 N. B. N. 423.

[4] *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

But see *Ex parte* Newhall, No. 10159 Fed. Cas., 2 Story 360.

For a further discussion of this question, see Sec. 175, *post*.

[5] *In re* Brown, 91 Fed. Rep. 358, 1 Am. B. R. 107, the court said: "Nor does it affect the question that, at the time the bankrupt act was passed, the title to the property in dispute was in the Brown-Heath Company, the fraudulent grantee, and was therefore beyond the reach of the bankruptcy court, assuming that the device of a conveyance by the partners to a corporation formed and controlled by them to take it would have that effect. By the voluntary reconveyance of the property by the Brown-Heath Company it becomes a part of the bankrupt estate, to be administered as such. The court is not called upon to set aside a conveyance. There is no such effect attaching to property which has been, at some time prior to the proceedings in bankruptcy, the subject of a fraudulent transfer, as to preclude the court of bankruptcy from thereafter dealing with such property, when the title is in the bankrupt. There is no contention that the bankrupt does not have the legal title, and is not in fact the owner of this property."

Whether the property of the husband or wife passes to the trustee in bankruptcy of the estate of the other depends upon local law.[6] If, under the law of the situs, the property of a wife or husband is subject to the payment of the debts of the other it passes to the trustee; if not, it does not pass to the trustee, but remains the separate property of such husband or wife not declared bankrupt. Thus it has been held that property of a bankrupt's wife, engaged in business without complying with a statute to entitle her to the privilege of a *femme sole* trader, passes to the trustee of her husband.[7] So also where the product of the separate property of the wife is liable for her husband's debts it passes to the trustee.[8] Where property has been conveyed to the wife in fraud of creditors it passes to the husband's trustee.[9] It has been held that, where a wife is entitled to one-third of the husband's personal property upon decree of divorce, the whole of his property pases to his trustee pending divorce proceedings by his wife.[10]

Property, purchased on condition that the title shall not pass until paid for, passes to the debtor's trustee, where such conditional sale is invalid as to creditors under the state law.[11] Where a valid lien exists under the state law in favor of the seller it passes to the trustee, subject to such lien.[12]

[6] *In re* Rooney, 109 Fed. Rep. 601, 6 Am. B. R. 478; *In re* Hammond, 98 Fed. Rep. 845, 3 Am. B. R. 446; *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555; Greensfelder v. Corbett (Sup. Ct. Ill.), 3 N. B. N. 825; Hawk v. Hawk, 102 Fed. Rep. 679, 4 Am. B. R. 463, 2 N. B. N. 940.

[7] *In re* Hammond, 98 Fed. Rep. 845, 3 Am. B. R. 466.

[8] *In re* Rooney, 109 Fed. Rep. 601, 6 Am. B. R. 778.

[9] *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555; Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; Greensfelder v. Corbett (Sup. Ct. Ill.), 3 N. B. N. 825.

[10] Hawk v. Hawk, 102 Fed. Rep. 679, 4 Am. B. R. 463, 2 N. B. N. 940.

[11] *In re* Legg, 96 Fed. Rep. 326; *In re* Garcewich (C. C. A. 2d Cor.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir), 110 Fed. Rep. 514, 6 Am. B. R. 615; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536.

[12] Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re*

It has been held that the interest of an infant partner passes to the trustee of the partnership.[14] But the earnings of a minor son, who has been expressly emancipated by his father, are not assets of the father's estate.[14]

The salary of a public officer not due or payable at the time of bankruptcy does not pass to the trustee.

A diamond stud worth $250,[15] a gold watch,[16] and a Masonic uniform,[16] have been held not to pass to the trustee, but may be held by a bankrupt as wearing apparel.

§ 168. Shares of stock.

Questions with reference to shares of stock will arise in bankruptcy proceedings in two relations. *First*, where the share is owned by the bankrupt, and, *second*, when a bankrupt corporation may enforce subscriptions for shares of stock.

First, Shares of stock in incorporated companies, standing in the name of a bankrupt, pass to his trustee subject to his election to take or reject them.[1] Where the stock stands in the name of a fictitious person, but belongs to the bankrupt, the court may direct the corporation to erase the name of the fictitious person and insert the bankrupt's name on their books.[2] Stock delivered as security for a *bona fide* debt, with power of attorney to have transfer made on books of the com-

Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Kellogg, 112 Fed. Rep. 52, 7 Am. B. R. 270; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[13] *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794, 2 N. B. N. 607.

[14] *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41.

[15] *In re* Doherty, 135 Fed. Rep. 432, 13 Am. B. R. 549.

[16] *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140.

[17] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259, 2 N. B. N. 296; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529.

[1] American File Company v. Garrett, 110 U. S. 286, 28 L. Ed. 149; Graham v. The Van Dieman's Land Co., 11 Ex. Rep. 101; South Straffordshire Ry. Co. v. Burnside, 5 Ex. Rep. 128.

[2] Green v. The Bank of England, 3 Y. & C. 722.

As to stock standing in the name of the wife of a bankrupt, but which was purchased with joint funds, see Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490.

pany, does not pass.[3] The trustee, however, may redeem such stock by paying the debt which it secures. Nor does stock pass which was honestly purchased with a wife's separate property years before the commencement of bankruptcy proceedings.[4]

Where the assignee elects to take stock he is entitled to have it transferred on the books of the corporation.[5] The trustee thereupon becomes a stockholder in the corporation, and may attend meetings of the corporation and vote the stock,[6] and is liable for assessments upon such stock. Where he elects not to take the stock, neither he nor the bankrupt's estate is liable for such assessments.[7]

Second, A trustee of a bankrupt corporation is entitled to recover unpaid subscriptions upon stock in such company as assets of the bankrupt company.[8] And the directors can not relieve the stockholders by refusing to make the call.[9] Nor can the shareholder make the defense of false and fraudulent representations inducing such subscription, especially when the subscriber has not been vigilant in discovering such fraud and repudiating his contract,[10] nor the defense of irregular organization of the corporation.[11] Such assessments are considered a trust fund for the creditors, and a stockholder indebted to the bankrupt corporation for unpaid shares of

[3] Dickinson v. Central National Bank, 129 Mass. 279.

[4] Glover v. Love, 26 Coop. Sup. Court Rep. 657.

[5] Wilson v. Atlantic, etc., R. Co., 2 Fed. Rep. 459.

[6] American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149.

[7] American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149.

[8] *In re* Crystal Springs Bottling Co., 96 Fed. Rep. 945, 3 Am. B. R. 194; Rathbone v. Ayer, 82 N. Y. Supp. 235; *In re* Morris Arc Lamp Co., 10 Am. B. R. 569; Payson v. Stoddard, No. 10803 Fed. Cas., s. c. 2 Dill. 427; Payson v. Withers, No. 10864 Fed. Cas., s. c. 5 Biss. 269; Payson v. Brooke, No. 10857 Fed. Cas., s. c. 1 Weekly Notes, 89; *In re* Republic Insurance Co., No. 11704 Fed. Cas., s. c. 3 Biss. 452; Upton v. Hansbrough, No. 16801 Fed. Cas., s. c. 3 Biss. 417.

[9] Rathbone v. Ayer, 82 N. Y. Supp. 235.

[10] Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Ogilvie v. Knox Insurance Co., 22 How. 380, 16 L. Ed. 349; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731.

[11] Chubb v. Upton, 95 U. S. 667, 24 L. Ed. 523.

stock can not set off against this fund a debt due him by the corporation.[12]

Stockholders', etc., Liability.—The right to enforce a statutory liability against an officer, director or stockholder of a bankrupt corporation does not pass to its trustee in bankruptcy. The trustee is not entitled to maintain a suit to enforce such liability in a state or federal court. The reason for this is that such liability is not a part of the estate of the corporation. By virtue of statutes of this character the officers, directors, or stockholders, or some of them, become, as it were, sureties for the debts of the corporation to the extent provided by the statute. It is in the nature of a security to which a creditor may resort if the corporation does not pay its debts.[13] The corporation could not enforce this liability. The trustee in bankruptcy has power to enforce certain rights of creditors for the benefit of the estate, but he is not concerned with secondary security to which a creditor may resort for the balance of his debt after he has collected as much of it as may be collected from the bankrupt's estate. The bankrupt act expressly provides that such liability is not released by the discharge of the corporation.[14] The creditor may, therefore, proceed to enforce the liability in a state court without joining the trustee as a party and without regard for bankruptcy,[15] except that a creditor will be permitted to recover in both proceedings the full payment of his debts only and no more.

§ 169. Membership in exchanges, franchises and privileges

Membership in an exchange vests in the trustee, subject to

[12] Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731.

[13] *In re* Crystal Spring Bottling Co., 96 Fed. Rep. 945, 3 Am. B. R. 194. See also Merrill v. Nat. Bank, 173 U. S. 131, 43 L. Ed. 640.

[14] B. A. 1898, Sec. 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[15] Wood & Selick v. Vanderveer, 55 N. Y. App. Div. 549; Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557.

See also *In re* Marshall Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Remington Auto. & Motor Co., 110 Fed. Rep. 441, 9 Am. B. R. 533.

the rules of the exchange.[1] The trustee, however, may elect not to take such certificate of membership.[2] In such case the certificate of membership remains in the bankrupt, and can not be taken from him afterwards by the trustee if it becomes valuable.[2]

A franchise or privilege which might have been transferred by the bankrupt or levied upon and sold under judicial process against him before the filing of the petition will pass to the trustee as an asset of the bankrupt's estate. Thus it was held that a permit to occupy a stand in market, revokable at the pleasure of the comptroller and transferable only with his permission, but which was ordinarily bought and sold for money, passes;[3] so also a license to take toll for crossing a bridge,[4] or a license to sell liquor.[5] But a franchise to take toll on a turnpike, being personal in its nature, was held not to pass to the trustee.[6] So also where a lease to a public house was determinable on the bankruptcy of the lessee, and contained a covenant by the lessee upon the termination of the term to assign the licenses to the lessor, it was held that no interest in the licenses passed to the trustee, but the lessor was

[1] Page v. Edmunds, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; *In re* Hullbutt, Hatch & Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 504, 13 Am. B. R. 50; *In re* Gaylord, 111 Fed. Rep. 717, 7 Am. B. R. 195; *In re* Neimann, 124 Fed. Rep. 738, 10 Am. B. R. 739; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; *In re* Werder, 15 Fed. Rep. 789; *In re* Warder, 10 Fed. Rep. 275; *In re* Ketchum, 1 Fed. Rep. 840. But see *In re* Sutherland, No. 13637 Fed. Cas., s. c. 6 Biss. 526.

[2] Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915. See also Meyers v. Josephson (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 10 Am. B. R. 687, affirming 121 Fed. Rep. 142, 9 Am. B. R. 345.

[3] *In re* Gallagher, No. 5192 Fed. Cas., 16 Blatch. 410; *In re* Emrich, 101 Fed. Rep. 231, 4 Am. B. R. 89, 2 N. B. N. 656.

[4] Stewart v. Hargrove, 23 Ala. 429.

[5] *In re* Fisher, 98 Fed. Rep. 89, 1 Am. B. R. 557, affirmed (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 4 Am. B. R. 646, 2 N. B. N. 221; *In re* Brodbine, 93 Fed. Rep. 643, 2 Am. B. R. 53; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412, 2 N. B. N. 245; *In re* Olewine, 125 Fed. Rep. 840, 11 Am. B. R. 40; *In re* McArdle, 126 Fed. Rep. 442, 11 Am. B. R. 358.

[6] People v. Duncan, 41 Cal. 508.

entitled to have the licenses delivered up to him upon the bankruptcy of the lessee.[7]

§ 170. Negotiable instruments.

All bills of exchange, promissory notes and other negotiable instruments belonging to the bankrupt vest in the trustee.[1] The bankrupt is no longer able to sue on such instruments, or to convey any perfect title to them by endorsement or otherwise. If the bankrupt makes a *bona fide* transfer of the instrument without endorsement before, he may endorse it after bankruptcy, and such endorsement will enable the holder of the instrument to maintain an action upon it in his own name.[2]

When a bill of exchange or a note is dishonored after the bankruptcy of the drawer or maker, notice of dishonor must be given as though bankruptcy had not intervened.[3] The better opinion seems to be that a notice to the bankrupt is a proper and sufficient notice if the trustee has not been appointed. He is the only person who can be notified.[4] If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, upon application to the court, will be permitted to prosecute. After a trustee has been appointed the safer practice is to give notice to him and also to the bankrupt.

§ 171. Pensions.

Pensions of a bankrupt granted by the government for military services are not vested in the trustee in banruptcy, as

[7] *Ex parte* Royle, 46 L. T. Bk. 85, 25 W. R. 560.

[1] Kitchen v. Bartsch, 7 East, 53; Gay v. Kingsley, 93 Mass. 345; Smith v. Chandler, 69 Mass. 392.

[2] Hughes v. Nelson, 29 N. J. Eq. 547; Hersey v. Elliott, 67 Me. 526; *Ex parte* Greening, 13 Ves. 206; Watkins v. Maule, 2 J. & W. 237; *Ex parte* Mowbray, 1 J. & W. 428; Smith v. Pickering, 1 Peak's N. P. Rep. 69.

[3] *Ex parte* Tremont National Bank, No. 14169 Fed Cas., 2 Low. 409; *Ex parte* Moline, 19 Ves. 216; Esdaile v. Sowerby, 11 East. 114; Nicholson v. Gouthit, 2 H. Black. 609; Bowes v. Howe, 5 Taunt. 30; Rohde v. Proctor, 4 B. & Cres. 517; Donnell v. Savings Bank, 80 Mo. 165; House v. National Bank, 43 O. S. 346; Calahan v. Bank of Kentucky, 82 Ky. 231.

[4] *Ex parte* Tremont National Bank, No. 14169 Fed. Cas., 2 Low. 409.

they are made by statute inalienable and not subject to attachment.[1] It has been held that the bankrupt's pension money in his hands at the time of filing his petition as it was received and not loaned or invested or changed in its nature will not pass to the trustee.[2] In England the rule is otherwise.[3] Salary and pensions of the army and navy and all persons employed or engaged in the civil service pass to the trustee in bankruptcy.

§ 172. Insurance policies.

Policies of insurance vest in the trustee, but the bankrupt act provides[1] that "when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

The status of life insurance policies will give rise to many interesting questions with reference to whether such policies pass to the trustee. Where such policies have a cash surrender value and are payable to the bankrupt, his estate or personal representatives, they undoubtedly pass to the trustee.[2]

[1] R. S. Secs. 4745 and 4747; see Streeter v. Sumner, 11 Foster (N. H.) 557.

[2] *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53.

[3] 46 and 47 Vict. Chap. 52, Sec. 52, which is substantially the same provision as that contained in Secs. 89 and 90 of the bankrupt act of 1869 (32 and 33 Vict.).

[1] B. A. 1898, Sec. 70, clause 5. Consult *in re* Bennett, No. 1315 Fed. Cas., 2 N. B. R. 181, as to Erben's case. *In re* Welling (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340.

[2] *In re* Diack, 100 Fed. Rep. 770, 3 Am. B. R. 723, 2 N. B. N. 664; *In re* Boardman, 103 Fed. Rep. 783, 4 Am. B. R. 620, 2 N. B. N. 821; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76, 3 N. B. N. 254; *In re* Lange, 91 Fed. Rep. 361, 1 Am. B. R. 186, 1 N. B. N. 44-60; *In re* Becker, 106 Fed. Rep. 54, 5 Am. B. R. 438, 3 N. B. N. 267; *In*

Policies without a cash surrender value also pass provided they have an actual value[3] and it has been held that the bankrupt should be permitted to pay that actual value and receive a conveyance from the trustee of all claims thereto.[4] It is to be observed that the trustee does not take policies of insurance payable to the wife, children or other kin of the bankrupt, but only policies the proceeds of which are payable to the bankrupt, his estate or personal representatives.

The rule with reference to insurance policies passing is well illustrated *In re* Steele.[5] It was there held that a policy payable to the bankrupt, his executors, administrators or assigns, became part of the assets of the bankrupt's estate, unless he availed himself of the right to pay the surrender value to the trustee; a policy issued on the life of one bankrupt, whose wife, another bankrupt, was to pay the premiums and receive the benefit of the policy, was part of the estate of the wife; another policy payable to the executors, administrators or assigns of the bankrupt, who had by a writing assigned the same to his fiancee, who afterwards became his wife, made the policy one payable to the wife of the bankrupt and it did not pass to the trustee.

Where an endowment policy is payable to the bankrupt and in case of his death to his wife, the bankrupt's interest in the surrender value of the policy passes to the trustee.[6]

re Steele, 98 Fed. Rep. 78, 3 Am. B. R. 549, 2 N. B. N. 281, reversed on another point in Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330.

[3] *In re* Welling (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76; *In re* Coleman (C .C. A. 2d Cir.), 136 Fed. Rep. 818, 14 Am. B. R. 461.

[4] *In re* Welling (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340.

[5] 98 Fed. Rep. 78, 3 Am. B. R. 549, 2 N. B. N. 281. This decree was reversed in Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330, on the ground that the bankrupt was entitled to claim these policies as exempt under the state law.

[6] *In re* Diack, 100 Fed. Rep. 770, 3 Am. B. R. 723, 2 N. B. N. 664; *In re* Boardman, 103 Fed. Rep. 783, 4 Am. B. R. 620, 2 N. B. N. 821; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76, 3 N. B. N. 254; *In re* Welling (C. C. A. (7th Cir.), 113 Fed. Rep. 189, 7 Am. B. R. 340; *In re* Steele, 98 Fed. Rep. 78, 3 Am. B. R. 549; *In re* Slingluff and

A policy of insurance does not pass to the trustee where it has no cash surrender value and no value except upon the contingency of the death of the bankrupt, if the premiums are kept paid,[7] or where the bankrupt is the beneficiary and not a contracting party and would not be entitled to the surrender value of the policy,[8] or where it is exempt under the laws of the state in which the bankrupt has his domicile.[9] In other words, if the bankrupt's interest in the policy at the date of his bankruptcy has no cash value, nothing passes to the trustee. The cash surrender value which a policy possesses is the cash value which would be recognized and paid by the insurer on the surrender of the policy at the date of the filing of the petition in bankruptcy, and is not confined to a surrender value expressly stipulated by the contract of insurance to be paid.[10]

In the schedules, which the petitioner in bankruptcy must file, the amount and character of insurance policies should be stated.

A life insurance policy, exempted by a state law from liability for debts, does not pass to the trustee.[11]

It has been held that when a trustee has once rejected a policy as having no surrender value and as being onerous, he

In re Steele seem to hold that the entire interest passes to the trustee and that wife of the bankrupt loses her contingent right; *In re* Diack; *In re* Boardman and *In re* Welling, protect the wife's contingent right and any equitable lien she may have obtained by paying premiums. *In re* Steele is expressly disapproved of in *In re* Welling; see also Haskell v. Equitable Life Assur. Society, 181 Mass. 341; Pingrey v. National Ins. Co., 144 Mass. 374; Pulsifer v. Hussey, 97 Me. 434, 9 Am. B. R. 657.

[7] *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389, 2 N. B. N. 230; *In re* Josephson, 121 Fed. Rep. 142, 9 Am. B. R. 345, affirmed by C. C. A. 5th Cir. in 124 Fed. Rep. 734, 10 Am. B. R. 687; Gould v. N. Y. Life Ins. Co., 132 Fed. Rep. 927, 13 Am. B. R. 233.

But see *In re* Mertens, 131 Fed. Rep. 972, 12 Am. B. R. 712.

[8] *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92.

But see *In re* Mertens, 131 Fed. Rep. 972, 12 Am. B. R. 712.

[9] Holden v. Stratton, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94.

[10] Holden v. Stratton, 198 U. S. 202-214, 49 L. Ed. 1018, 14 Am. B. R. 94.

[11] Holden v. Stratton, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; Steele v. Buel (C. C. A. 8th

can not claim the proceeds if the premiums are kept up and the policy becomes valuable because of the death of the bankrupt, but that he can claim the amount of the surrender value out of the proceeds if it later appear that there was a surrender value.[12]

Fire Insurance Policies.—Standard policies of fire insurance do not regularly pass to the trustee except by the consent of the insurance company. The trustee must insure the property after the title to it passes to him, if it is desired to have the property insured. Where a fire occurs after a petition in bankruptcy is filed and before the appointment of a trustee, the trustee may sue on the policy issued to the bankrupt and recover for the loss.[13] For the reason that no change of title is effected until the appointment and qualification of the trustee. A trustee can not recover for loss on property insured by a bankrupt and burned after the trustee is qualified. For the reason that most policies are void when the title to the property is changed and the title to the bankrupt's property is changed by the qualification of the trustee.

§ 173. Property held by the bankrupt as trustee.

Property which the bankrupt holds in trust for some other person does not vest in the trustee.[1] The act of 1867 provided that no property held by the bankrupt in trust should pass.[2] This was a mere declaration of a well-settled principle.[3]

Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330; Pulsifer v. Hussey, 97 Me. 434, 9 Am. B. R. 657.

[12] *In re* Josephson, 121 Fed. Rep. 142, 9 Am. B. R. 345, affirmed (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 10 Am. B. R. 687.

[13] Fuller v. Jameson, 184 N. Y. 605; Fuller v. N. Y. Fire Ins. Co., 184 Mass. 12.

[1] Perry on Trusts, Sec. 345; see also Carpenter v. Marnell, 3 B. & P. 40.

[2] R. S. Sec. 5053.

[3] This rule was laid down as early as 1742 by Lord Chief Justice Willes, in Scott v. Surman, Willes' Rep. 400: "My notion," he said, "is that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees

The trustee is vested only with the title of the bankrupt.[4] Property, which belongs in law or equity to another person, does not pass to the trustee as an asset in bankruptcy.[5] This includes property held by the bankrupt as an express trustee, or as an agent or bailee, or collector of rents, or in any fiduciary position.[6] The beneficial owner, as against the trustee in bankruptcy, is entitled to such property if it can be identified, or the trust property can be traced and followed into other property into which it has been converted.[7] For this purpose

even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts. And I found this my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again upon the rule concerning circuity of action; for I think it would be very absurd to say that anything shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and, according to the case of Burdett v. Willett, will likewise have costs decreed against them; and so the effects of the bankrupt which ought to be applied to the discharge of his debts will be wasted to serve no purpose whatever. If, therefore, the bankrupt were seized of a trust estate in lands, for the reasons already mentioned, I should think that it did not vest in the assignees at all, but that the legal estate as to that should still remain in the bankrupt for the benefit of the *cestui que trust.*"

Speaking of the opinion of Lord Chief Justice Willes, Vice-Chancellor Whittlesey, in Ontario Bank v. Mumford, 5 N. Y. Chan. Rep. 616, after referring to the quotation above, said "But as his associates upon the bench were not prepared to put the decision of the case then under consideration upon that ground the point was left undecided. That notion of this learned and distinguished jurist, however, was subsequently followed, and has long since become the settled law, not only in England, but in this state."

See also Ludwig v. Highley, 5 Pa. St. 132; Kip v. Bank of New York, 10 Johns. (N. Y.) 63; Blin v. Pierce, 20 Vt. 25.

[4] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[5] Sec. 152, *ante.*

[6] Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; *In re* Hallett's Estate, 13 Ch. Div. 696.

[7] Smith v. Au Gres (C. C. A. 6th Cir.), 148 Fed. Rep. —; *In re* Tay (C. C. A. 8th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; Welch v. Polley, 177 N. Y. 117;

"There is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."[8] But where he can not trace the trust property or fund, in its original or some substituted form, in the estate which comes into the hands of the trustee, he is not entitled to any priority over the general creditors with whom he is entitled to share *pro rata*.[9]

At one time the rule was that trust property could be followed into other kinds of property, but when turned into money and mixed with other money, it could not be followed because money had no earmark by which the trust fund could be identified.[10] Applying this theory, the courts held that where a bankrupt mixed trust funds with his own money in a bank account the beneficiary could not follow the fund into the hands of the trustee, but was a general creditor to the amount of his claim.[11] The modern rule is that "equity will follow money even if put into a bag or indistinguishable mass by taking out the same quantity.[12] This doctrine has been applied in bankruptcy under the present act. If the bankrupt mixes trust funds or property with his own, the

11 Am. B. R. 215; Deere Plow Co. v. McDavid (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 14 Am. B. R. 653; Bills v. Schliep (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 11 Am. B. R. 607; *In re* Gaskill, 130 Fed. Rep. 235, 12 Am. B. R. 251; Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 618.

[8] Nat. Bank v. Insurance Co., 104 U. S. 54, 68, 26 L. Ed. 693.

[9] Deere Plow Co. v. McDavid (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 14 Am. B. R. 653.

[10] See cases discussed in the opinions *In re* Hallett's Estate, 13 Ch. Div. 696, and Nat. Bank v. Insurance Co., 104 U. S. 54, 26 Ld. Ed. 693, where the rule is disapproved.

[11] Illinois Trust & Savings Bank v. First Nat. Bank, 15 Fed. Rep. 858; *In re* Janeway, No. 7208 Fed. Cas., 4 N. B. R. 100; *In re* Hobbs, No. 6549 Fed. Cas., 2 Low. 491; Phelan v. Iron Mountain Bank, No. 11069 Fed. Cas., 4 Dill. 88; *In re* Bank of Madison, No. 890 Fed. Cas., s. c. 5 Biss. 515; Bank of Commerce v. Russell, No. 884 Fed. Cas., s. c. 2 Dill. 215.

[12] *In re* Hallett's Estate, 13 Ch. Div. 696; Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Holder v. Western German Bank (C. C. A. 6th Cir.), 136 Fed. Rep. 90; Western German Bank v. Norvell (C. C. A. 5th Cir.), 134 Fed. Rep. 724.

whole will pass to the trustee impressed with a lien to the extent of the trust property.[13]

Clearly property held by the bankrupt under a deed or will for the benefit of some other person is trust property which does not vest in the trustee.[14] It is well settled that an exchange of securities held in trust is not a confusion of property, but that the new securities constitute the trust property.[15] It has been held to be trust property which could be traced by the beneficiary where a broker kept the bonds of his principal, and proceeds from the sale of them, in a particular envelope or box, separate and apart from his own property,[16] or where the proceeds of the sales of property of a number of consignors were placed by the bankrupt factor in the hands of his attorney, in order that the fund might be kept separate and apart from his general estate.[17] Where cotton was by mistake delivered to factors to whom it was not consigned and was sold and the proceeds deposited in a bank, the owner of the cotton was entitled to the value as against the trustee of the factors in bankruptcy.[18] The assets of a partnership in the hands of one partner charged with the payment of the debts of the firm, are trust property.[19] There is a fiduciary relation between vendee and vendor in case of a fraudulent sale of goods when the vendor elects to rescind the sale and reclaim

[13] Erie R. R. Co. v. Dial (C. C. A. 6th Cir.), 140 Fed. Rep. 689, 15 Am. B. R. 559; Bills v. Schliep (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 11 Am. B. R. 607, Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 618; *In re* Woods & Malone, 121 Fed. Rep. 599, 9 Am. B. R. 615.

[14] Faxon v. Folvey, 110 Mass. 392; Swepson v. Ronse, 65 N. C. 34.

[15] Cook v. Tullis, 18 Wall. 340, 21 L. Ed. 933; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Burnhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Taylor v. Plumer, 3 Maule & S. 562.

[16] Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Voight v. Lewis, No. 16989 Fed. Cas., 14 N. B. R. 543. See also Hugewitter v. Von Sacks, No. 14343 Fed. Cas., 4 Ben. 167.

[17] *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417.

[18] *In re* Woods & Malone, 121 Fed. Rep. 599, 9 Am. B. R. 615.

[19] Jones v. Newsom, No. 7484 Fed. Cas., 7 Biss. 321; Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801; Holland v. Fuller, 13 Ind. 195.

the goods.[20] Where a manufacturer mixed a consignment of raw material with other like material in the course of business, the owner of the consignment was permitted to follow the raw material in the mass.[21] Moneys deposited in a bank for a specific purpose is a trust fund which may be followed into the hands of the trustee of the bank.[22]

Where a sale of a stock of goods was made in bulk to buyers, who subsequently became bankrupt, and the seller fully complied with the state law requiring such sales to be accompanied by a list of the seller's creditors and payment of the price to be applied to their claims, a part of the price remaining unpaid at the time of the buyers' bankruptcy constituted a trust fund for the benefit of the seller's creditors, in so far as it represented a part of the stock remaining at the time of the bankruptcy, or was capable of being segregated from the other assets of the bankrupt.[23] The purchaser of such goods is not entitled to claim exemptions out of the trust property as against the creditors of the seller.[24]

Controversies with reference to whether property is held in trust or not are to be determined by the court of bankruptcy. They ordinarily arise either upon the application of the trustee for possession of the property or upon the application of the beneficiary to have the property delivered to him, or the value of such property paid to him. In either case an order of the court will be made only upon petition and proofs.

§ 174. Trust property in which the bankrupt has a beneficial interest.

Whether the beneficial interest of a bankrupt in property held in trust passes to the trustee or not depends upon whether

[20] See Sec. 152*b*, *ante*.

[21] Erie R. R. Co. v. Dial (C. C. A. 6th Cir.), 140 Fed. Rep. 689, 15 Am. B. R. 559.

[22] Smith v. Mottley (C. C. A. 6th Cir.), 149 Fed. Rep. —; Holder v. Western German Bank (C. C. A. 5th Cir.), 136 Fed. Rep. 90; Western German Bank v. Norvell (C. C. A. 5th Cir.), 134 Fed. Rep. 724; Nat. Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

But see *In re* Smart, 136 Fed. Rep. 974, 14 Am. B. R. 672.

[23] *In re* Gaskill, 130 Fed. Rep. 235, 12 Am. B. R. 251.

[24] *In re* Connor, 146 Fed. Rep. 998.

it is such an interest that the bankrupt might have transferred it, or it might have been levied upon or sold under judicial process against him. If it is so vested it passes.[1] If it is not, it will not pass to the trustee.[2] Such questions are determinable only by the local law of the state, territory or district where the property has its situs.[3]

The bankruptcy of the beneficiary ordinarily puts an end to any discretion which the trustee under the trust may have in the disposition of the trust funds, and vests the whole interest of the *cestui que trust* in the trustee in bankruptcy.[4] But where the bankrupt's interest is terminated by his bankruptcy there is nothing to pass to the trustee, because his beneficial interest in the trust property is ended.[5]

§ 175. After-acquired property.

Property acquired by a bankrupt subsequent to the commencement of bankruptcy proceedings and which does not pass to the trustee is called after-acquired property. Such prop-

[1] Sandford v. Lackland, No. 12312 Fed. Cas., 2 Dill. 6; Smith v. Profitt, 82 Va. 832; Sparhawk v. Cloon, 125 Mass. 263; Anderson v. Miller, 15 Smedes & M. (Miss.) 286.

[2] Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512.

[3] Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512. See also Nichols v. Eaton, 91 U. S. 729, 23 L. Ed. 254.

In some of the states, as in New York, Illinois and Tennessee, there are statutory provisions preventing the alienation of trust estates or exempting the interests of the beneficiaries therein from liability for the debts where the trust is created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered. Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; Williams v. Thorn, 70 N. Y. 270; Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Spindle v. Shreve, 111 U. S. 542-548, 28 L. Ed. 512, and one branch of Potter v. Couch, 141 U. S. 319, 329, 35 L. Ed. 721, were cases where statutory provisions were construed and applied.

[4] Snowdon v. Dales, 6 Sim. 524; Graves v. Dolphin, 1 Sim. 66; Younghusband v. Gisborne, 1 Coll. 400; Piercy v. Robert, 1 Myl. & K. 4; *Re* Sanderson's Trust, 3 K. & J. 497; Green v. Spicer, 1 R. & M. 395.

[5] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254.

erty in this country is liable for his debts prior to bankruptcy only on condition he does not succeed in obtaining a discharge.[1]

Under the act of 1841 all property vested in the bankrupt, at the time of the decree declaring him a bankrupt, passed to his assignee and only property acquired after the adjudication was after-acquired property.[2] Under the act of 1867 the date of cleavage was the date of filing the petition and any property acquired thereafter was after-acquired property.[3]

Section 70 of the bankrupt act of 1898 provides that the title of the bankrupt shall vest in the trustee "as of the date he was adjudged a bankrupt" (except such as is exempt), to six classes of property there enumerated. These are, *first,* documents; *second*, patents and copyrights; *third,* powers; *fourth,* property transferred in fraud of creditors; *fifth,* property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and *sixth,* rights of action upon contracts. The only right or title the trustee has to any of the bankrupt's property is acquired under this section.[4] If property of the bankrupt is not embraced in one of the six provisions it does not pass to the trustee, and if acquired after the commencement of bankruptcy proceedings is after-acquired

[1] *In re* Woods, 133 Fed. Rep. 82, 13 Am. B. R. 240.

[2] Act of 1841, Sec. 3, 5 Stat. at L. 443; *Ex parte* Newhall, No. 10159 Fed. Cas., 2 Story, 360; Fisher v. Currier, 7 Mat. (Mass.) 427.

[3] *In re* Barnett, No. 1024 Fed. Cas., 3 Pitts. Rep. 559; Mays v. National Bank, 64 Penn. St. 74; Day v. Superior Court, 61 Cal. 489; Mosby v. Steele & Metcalfe, 7 Ala. 299; *In re* Benson, No. 1328 Fed. Cas., 8 Biss. 116; *In re* Grant, No. 5693 Fed. Cas., 2 Story 312.

In England, after-acquired property is an asset of the bankrupt's estate (46-7 Vict., Chap. 52, Sec. 44, (1),) and has been so treated from early times, act of 5 George II., Chap. 30; *Ex parte* Proudfoot (1743), 1 Atk. 252; Ashley v. Kell, 2 Stra. 1207; Webb v. Ward, 7 T. R. 296; Kitchen v. Bartsch, 7 East. 53; Crofton v. Poole (1830), 1 B. & Ad. 568; Bankrupt Act of 1869 (32-3 Vict.), Sec. 15.

[4] Steele v. Buell (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165, 3 N. B. N. 330; *In re* McDonnell, 101 Fed. Rep. 239, 4 Am. B. R. 92.

property. It will be observed that no date is fixed in the first four and sixth clauses other than the date of adjudication to determine what property in those classes passes to the trustee. It must be the property the title to which is vested in the bankrupt at the date he is adjudged a bankrupt.

The fifth clause specifies particularly that it is the property, which was alienable or subject to levy and execution at the date of filing the petition, which passes. This property passes as of the date of the adjudication and only such property passes as was alienable or subject to levy and execution at the date of filing the petition. Property acquired by the bankrupt between the date of filing the petition and the adjudication which would otherwise be embraced within the fifth clause may be considered after-acquired property.[5]

After-acquired property includes all property acquired in a new business in which he may have engaged,[6] money borrowed for the purpose of engaging in business,[7] or crops planted after the adjudication,[8] wages or salary, property which may come to him by way of inheritance or devise,[9] such as he may have obtained from a wife upon his divorce granted after bankruptcy,[10] property acquired under an agreement made subsequent to bankruptcy,[11] and a right to redeem lands obtained by a waiver of a previous forfeiture.[12]

The trustee has no interest whatever in after-acquired property, and is not entitled to examine the bankrupt relative to such property.[13]

[5] *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

[6] *In re* Rosenfield, No. 12059 Fed. Cas., 1 N. B. R. 319.

[7] *In re* Patterson, No. 10815 Fed. Cas., 1 Ben. 496.

[8] *In re* Barnett, No. 1024 Fed. Cas., 3 Pitts. Rep. 559: See *In re* Barrow, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95.

[9] *In re* Woods, 133 Fed. Rep. 82, 13 Am. B. R. 240; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12. *In re* McKenna, 137 Fed. Rep. 611, 15 Am. B. R. 4, the testator died one hour and fifteen minutes before beneficiary filed his voluntary petition, and the legacy passed to trustee.

[10] *In re* Benson, No. 1328 Fed. Cas., 8 Biss. 116.

[11] Cullen v. Dawson, 24 Minn. 66; *In re* Oleson, 110 Fed. Rep. 796, 7 Am. B. R. 22.

[12] Kittridge v. McLaughlin, 33 Me. 327.

[13] *In re* Patterson, No. 10815 Fed. Cas., 1 Ben. 496; *In re* Rosen-

A court of chancery will interfere by injunction to protect the bankrupt in the enjoyment of such property until it can be ascertained whether he will obtain his discharge.[14]

§ 176. Rights of action upon contracts, for injury, etc., to property.

The bankrupt act transfers and vests in the trustee all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, the bankrupt's property.[1] This provision is in accord with the general spirit of the act that everything belonging to the bankrupt that can be turned to profit passes to the trustee for the benefit of the creditors. The trustee, however, as in case of property, may elect to adopt or reject such rights of action, according as they are likely to be beneficial or onerous to the estate.[2] Where the trustee does not elect to exercise such a right of action, it remains in the bankrupt.[3]

This provision authorizes the trustee to maintain suits arising from two distinct causes of actions. *First*, those arising *ex contractu*, and, *second*, those arising *ex delictu*, so far as they affect property.

field, No. 12059 Fed. Cas., 1 N. B. R. 319; *In re* Levy, No. 8296 Fed. Cas., 1 Ben. 496.

[14] Mosby v. Steele & Metcalfe, 7 Ala. 299.

[1] B. A. 1898, Sec. 70, clause 6.

[2] Gibson v. Carruthers, 8 M. & W. 326, Rolfe, B.; Lawrence v. Knowles, 5 Bing. N. C. 399; Morgan v. Bain, L. R. 10 C. P. 15; *In re* Phœnix Bessemer Steel Co., 4 Chan. D. 108. See also Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915; Sessions v. Romadka, 145 U. S. 39, 30 L. Ed. 608; American File Co. v. Garrett, 110 U. S. 295, 28 L. Ed. 140; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43.

In Kittle v. Hall, 29 Fed. Rep. 512, the court said: "It can not be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and that his failure to do so is negligence."

[3] Chilton v. Cabiness, 14 Ala. 447.

In Clark v. Calvert, 8 Taunt. 742, an action for trespass on land before the bankruptcy of the assignee was maintained by the bankrupt in his own name. The court said (p. 751): "We form our opinion on the precise nature of the action and on the ground that the assignees had not interposed." See also Rogers v. Spence, 13 M. & W. 571, affirmed in the House of Lords, 12 Clark & Finn. 700.

Consult also Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915; Taylor v. Irwin, 20 Fed. Rep. 615; Smith v. Gordon, No. 13052 Fed. Cas., 6 Law Rep. 313.

First: Actions upon Contracts.—As a general proposition bankruptcy does not discharge a contract.[4] In no case can the party who contracted with a bankrupt set up the bankruptcy against the assignees as a reason for not doing what he has agreed to do.[5] But where the contract has not been executed by the bankrupt he, or the trustee (if he may do the act), must perform the condition which remains to be performed in order to claim the benefit of the contract.[6]

Cases arising upon contracts may be either for the consideration of liquidated damages or for unliquidated damages on account of a breach of the covenants contained in the contract. All the rights of action being vested in the trustee by the bankrupt act, he, and not the bankrupt, must maintain all suits upon contracts made with the bankrupt, as well for unliquidated[7] as for liquidated damages, whether the breach occurred before[8] or after the bankruptcy,[9] unless the trustee elects to abandon the right.

Thus the trustee is the proper party to institute a suit to recover the value of lands or goods and merchandise sold by the bankrupt,[10] or to maintain a suit for damages for not delivering goods to the bankrupt which had been contracted for,[11] or a suit to recover money had and received from the bankrupt.[12] So also the trustee, where a right of action exists under the state or federal law, may recover money lost in gambling,[13] or may bring suit to recover usurious interest.[14]

[4] Brooke v. Hewitt, 3 Ves. 253; Carey v. Nagel, No. 2403 Fed. Cas., 2 Biss. 244.

[5] Rolfe, B., in Gibson v. Carruthers, 8 M. & W. 327.

[6] Gibson v. Carruthers, 8 M. & W. 321.

[7] Wright v. Fairfield, 2 B. & Ad.

[8] Beckham v. Drake, 2 H. L. 579.

[9] Gibson v. Carruthers, 8 M. & W. 321; Schondler v. Ware, 1 Camp. 487; Fuller v. N. Y. Fire Ins. Co., 184 Mass. 12; Fuller v. Jameson, 18; N. Y. 605.

[10] Stewne v. Ayles-worth, 18 Conn. 244.

[11] Wright v. Fairfield, 2 B. & Ad. 727; Gibson v. Carruthers, 8 M. & W. 321.

[12] Foster v. Lovell, 4 Mass. 397.

[13] Moore v. Jones, 23 Vt. 739; Brandon v. Pate, 2 H. Black. 308; Brandon v. Sands, 2 Ves. Jr. 514. But see Lafountain v. Savings Bank, 56 Vt. 332.

[14] Wright v. First National Bank, No. 18078 Fed. Cas., 8 Biss. 243; Bromley v. Smith, No. 1922 Fed. Cas., 2 Biss. 511; Monongahela

A trustee may maintain a suit on a policy of insurance to recover damages by a fire after an adjudication in bankruptcy and before the appointment of the trustee.[15] In those cases, where the common law prevails with reference to wife's property, choses in action belonging to her do not pass to the trustee, unless reduced to possession.[16] Nor does purely personal property of the wife, as ornaments, jewelry, apparel, etc., pass, even in those states.[17] A wife's separate property never passes to the trustee of the bankrupt husband.[18]

Although, generally, rights under contracts pass to the trustee, the general rule is subject to two important exceptions.

First Exception. A right of action where the breach of a contract involves injury to the person or the feelings of the bankrupt, without immediate reference to his rights of property, does not pass to the trustee.[19] Such rights of action, for instance, are those for the breach of a contract of marriage, or for negligently carrying the bankrupt by rail, coach or vessel, or negligently conducting a cure whereby his person is injured, or negligently conducting a suit whereby he is imprisoned. Although, it is true, the estate of the bankrupt is incidentally affected by the recovery or failure to recover in such actions, the gist of the action is conceived to be personal in its nature, and therefore does not pass to the trustee.

Second Exception. A right of action arising upon an exec-

Bank v. Overholt, 96 Penn. St. 327; Gray v. Bennett, 44 Mass. 522. See also Tiffany v. Boatman's Institution, 18 Wall. 375, 21 L. Ed. 868.

[15] Fuller v. N. Y. Fire Ins. Co., 184 Mass. 12; Fuller v. Jameson, 184 N. Y. 605.

[16] Shay v. Sessaman, 10 Penn. St. 432; Chilton v. Cabiness, 14 Ala. 447.

[17] *In re* Grant, No. 5693 Fed. Cas., 2 Story, 312; *In re* Ludlow, No. 8599 Fed. Cas., 1 N. Y. Leg. Obs. 332; T. L. Lexan v. Wilson, 43 Me. 186; Carr v. Gale, No. 2434 Fed. Cas., 2 Ware, 330; Backhouse v. Jett, 710 Fed. Cas., s. c. 1 Brock, 500.

[18] See Voohees v. Bonesteel, 16 Wall. 16, 21 L. Ed. 268; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865; Driggs v. Russell, No. 4084 Fed. Cas., 3 N. B. R. 161; *In re* Eldred, No. 4328 Fed. Cas., 3 N. B. R. 256; Glenn v. Johnson, 18 Wall. 476, 21 L. Ed. 856.

[19] See Beckham v. Drake, 8 M. & W. 846, s. c. in House of Lords, 2 H. L. 579, where this subject is elaborately discussed.

utory contract, in which the personal skill or conduct of the bankrupt forms a material part, does not vest in the trustee."[20]

Some contracts of this nature are necessarily terminated by the bankruptcy because it becomes impossible to perform the condition thereafter. A contract by a bankrupt to enter into partnership is a familiar example. Manifestly neither the bankrupt nor his trustee can perform the part agreed or maintain a suit for the breach of it.

Other contracts of this nature can be performed by the bankrupt, although by no other person. Such are contracts with authors, actors, musicians, artists, etc. It may be doubted if such a contract may be enforced by a trustee under the present statute. It can not at all events be doubted that where a contract remains to be executed, and it can not be executed without the cooperation of the bankrupt, that the trustee can not enforce the contract unless he can procure the bankrupt to cooperate with him. Under the present statute after-acquired property does not pass. The bankrupt may refuse to do his part, and thereupon make a new contract with the same party and receive the benefit of it himself.

SECOND: ACTIONS FOR INJURY, ETC., TO PROPERTY.—A right of action *ex delicto* for the recovery of damages arising from the unlawful taking or detention of, or injury to, the bankrupt's property is expressly vested in the trustee.[21]

Such actions are confined to those relating to his real or personal property. Thus, claims for an unlawful seizure of property by a foreign government,[22] claims against the United States by a citizen[23] or a resident alien,[24] pass to the trustee. It has also been held that the trustee and not the bankrupt is the proper party to institute a suit to recover for improvement

[20] Streeter v. Sumner, 11 Foster (N. H.) 542. See also Gibson v. Carruthers, 8 M. & W. 321; and Beckham v. Drake, 2 H. L. 579.

[21] B. A. 1898, Sec. 70, clause 6.

[22] Clark v. Clark, 17 How. 315, 15 L. Ed. 77; Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108; Williams v. Heard, 140 U. S. 529, 35 L. Ed. 550.

[23] Erwin v. United States, 97 U. S. 392, 24 L. Ed. 1065.

[24] Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473.

made on government lands,[25] or for money obtained by deceit and fraud,[26] or against a sheriff for not collecting the contents of an execution.[27]

Actions for Personal Injuries.—A right of action, however, for the recovery of damages for injury to the person or the personal feelings of the bankrupt are personal torts, and does not vest in a trustee.[28] Such are actions for malicious prosecutions,[29] or a trespass for seizing and selling the plaintiff's goods under a false claim of debt,[30] or slander or libel,[31] or an assault and battery, or deceit arising out of a fraudulent recommendation of a person to a position of confidence, whereby property entrusted to him is lost.[32]

It has been held that a father's right of action in Michigan for the wrongful killing of a son passes to the trustee under Sec. 70, clause 5.[33]

[25] French v. Carr, 7 Ill. 664.

[26] Hyde v. Tufts, 45 N. Y. Sup. Ct. 56.

[27] Sullivan v. Bridge, 1 Mass. 511.

[28] *In re* Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286. Judge DeHaven, after quoting the provisions of the act relating to what property vests in the trustee, said: "A cause of action for damages arising out of a personal wrong suffered by the bankrupt is not embraced in the foregoing description of property, the title to which, by operation of law, vests in the trustee of the bankrupt. The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal. It can not be assigned, is not subject to levy and sale upon judicial process, and the statute does not contemplate that the bankrupt's right to maintain an action to recover damages for such wrongs shall constitute any part of his estate in bankruptcy. The law follows, in this respect, Section 14 of the bankruptcy act of 1867 (14 U. S. Stats. 517), in the construction of which it was uniformly held that rights of action for personal torts did not vest in the assignee in bankruptcy." See also cases cited in the notes below in this section.

[29] *In re* Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286; Noonan v. Orton, 34 Wis. 259.

[30] Brewer v. Dew, 11 M. & W. 625; Rogers v. Spence, 13 M. & W. 571; affirmed in the House of Lords, 12 Clark & Fenn. 700.

[31] Dillard v. Collins, 25 Grat. (Va.) 343.

[32] *In re* Brick, 4 Fed. Rep. 804; *In re* Crockett, No. 3402 Fed. Cas., 2 Ben. 514.

[33] *In re* Burnstine, 131 Fed Rep. 828, 12 Am. B. R. 596.

CHAPTER XVII.

EXEMPTIONS.

§ 177. By what laws exemptions are granted.

No particular property of the bankrupt is mentioned in the act as exempt from being applied to the payment of his debts. Military uniforms, arms and equipments are exempted by the statutes of the United States.[1]

The bankrupt statute declares that it "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."[2]

By this provision congress evidently intended to adopt the laws of the several states and territories[3] regulating exemptions. A court of bankruptcy is, therefore, to look to the exemption laws of the several states and territories for the description of the person who may claim exemption and for the amount and species of the property to be exempt.[4] A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the state laws and to none other.[5] In order to claim exemptions in bankruptcy he must comply

[1] R. S. Sec. 1628.

[2] B. A. 1898, Sec. 6. Compare R. S. Sec. 5045.

Exemptions in bankruptcy and under state laws compared. See Holland v. Withers, 76 Ga. 667.

[3] B. A. 1898, Sec. 1, clause 24, provides that "states shall include the territories, the Indian Territory, Alaska and the District of Columbia." See also *In re* McKercher and Pettigrew, 8 N. B. R. 409.

[4] Richardson v. Woodward (C. C. A. 4th Cir.), 104 Fed. Rep. 873, 5 Am. B. R. 94; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165.

[5] *In re* Manning, 112 Fed. Rep. 948, 7 Am. B. R. 571.

with the requirements of the state law.[6] If he fails to bring himself within the conditions and requirements of such law, the property claimed is not exempt from the operation of the bankrupt law, and the trustee should administer it for the benefit of creditors.

In applying these exemption laws the bankruptcy courts will adopt and follow the construction of them announced by the highest court of the state the statute of which is involved.[7] If the state law has not been construed by the state tribunals, or if there is a conflict of opinion as to the meaning of a particular provision, the courts of bankruptcy are free to construe it. Otherwise they are bound by the interpretation given by the state courts. These are familiar and well-settled rules recognized by the United States courts with reference to state laws and constitutions generally.[8] A state law which is invalid or unconstitutional under a state or the federal constitution is not adopted by this provision.[9] A court of bankruptcy will not enforce such a law.

[6] *In re* Farish, No. 4647 Fed. Cas., 2 N. B. R. 168; *In re* Gainey, No. 5181 Fed. Cas., 2 N. B. R. 525; *In re* Jackson, No. 7127 Fed Cas., 2 N. B. R. 508; Guise v. State, 41 Ark. 249; Briggs v. McCullough, 36 Cal. 542; Griffin v. Sutherland, 14 Barb. (N. Y.), 456.

[7] *In re* Stevenson, 93 Fed. Rep. 789, 2 Am. B. R. 230; *In re* Pope, 98 Fed. Rep. 722, 3 Am. B. R. 525; *In re* Waxelbaum, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 416; *In re* Woodward, 95 Fed. Rep. 955, 2 Am. B. R. 692; *In re* Wyllie, No. 18112 Fed. Cas., s. c. 2 Hughes, 449; Goodall v. Tuttle, No. 5533 Fed. Cas., 3 Biss. 219.

The supreme court of the United States recognized this principle, with reference to exemption laws, in Gunn v. Barry, 15 Wall. 621, 21 L. Ed. 212, when it said: "It may well be doubted whether both these provisions [of the exemption statute of Georgia] were not intended to be wholly prospective in their effect. But as we understand the supreme court of the state has come to a different conclusion we shall not consider the question."

[8] Morley v. Lakeshore Ry. Co., 146 U. S. 162, 36 L. Ed. 925; Leffingwell and Warren, 2 Black. 603, 17 L. Ed. 261; Randall v. Brigham, 7 Wall. 541, 19 L. Ed. 285; Provident Institution v. Massachusetts, 6 Wall, 630, 18 L. Ed. 907; Bucher v. Cheshire R. R. Co., 125 U. S. 582, 31 L. Ed. 795.

[9] See *In re* Everitt, No. 4579 Fed. Cas., 9 N. B. R. 90; *In re* Dillard, No. 3912 Fed. Cas., 2 Hughes 190.

The law which governs any particular case is that prescribed by the state laws in force at the time of the filing of the petition in the state wherein the bankrupt has had his domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.[10] This will usually be the law of the state in which the petition is filed. It is not necessarily so. A person may be adjudged a bankrupt in a district where he has his principal place of business and which is not the district of his domicile.[11] In such cases the amount and the species of the property to be exempt is determined by the law of the state of his domicile, and not the state in which he has his principal place of business. It is not necessary or proper to look to the law of the state in which the property is situated to see if it is exempt. If the property is exempt under the law of the state of the bankrupt's domicile, it is exempt wherever it may be situated.[12]

It has been held that a statute exempting wearing apparel included a diamond stud worth $250,[13] a watch,[14] a Masonic uniform,[14] and a statute exempting tools of an artisan or mechanic include the articles which a baker uses to carry on his trade,[16] and a watch where it was necessary for the work-

As to when an exemption law is unconstitutional because it impairs the obligation of a contract, see Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212.

[10] B. A. 1898, Sec. 6; *In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81, 2 N. B. N. 636; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Woodard, 95 Fed. Rep. 260, 2 Am. B. R. 339; *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389; *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262. See *In re* Kerr, No. 7729 Fed. Cas., 9 N. B. R. 566; *In re* Dillard, No. 3912 Fed. Cas., s. c. 2 Hughes, 190.

[11] B. A. 1898, Sec. 2, clause 1.

[12] *In re* Stevens, No. 13392 Fed. Cas., 2 Biss. 373.

[13] *In re* Smith, 96 Fed. Rep. 832, 3 Am. B. R. 140.

[14] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529.

But see *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549; *In re* Everleth, 129 Fed. Rep. 620, 12 Am. B. R. 236.

[15] *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259, 2 N. B. N. 296; but see *In re* Everleth 129 Fed. 620, 12 Am. B. R. 236.

[16] *In re* Petersen, 95 Fed. Rep. 417, 2 Am. B. R. 630.

man to know the time.[17] Where growing crops are not exempt under the state law, the bankrupt is not entitled to the growing crops on an exempt homestead.[18]

A bankrupt is not entitled to exemptions out of the proceeds of the sale of a license to sell liquor in Pennsylvania.[19]

Where a policy of insurance is exempt under the laws of the state of the bankrupt, they are exempt under Section 6 of the Bankrupt Act, even though they have cash surrender values.[20] The provisions of Section 70*a* of the Bankrupt Act do not apply to policies which are exempt under the state law.[20]

§ 177a. The domicile of a bankrupt.

By domicile is meant that residence from which there is no present intention to remove, or to which there is a general intention to return. The domicile of a bankrupt does not depend on citizenship, nor on residence, but on the concurrence of two elements: *first*, residence in a place, and, *second*, the intention for the present to make that place his home.[1] A person can not be without a legal domicile somewhere.[2] The domicile of a person may be changed. To constitute a new domicile two things are indispensable: *first*, residence in a new locality, and, *second*, the intention to remain there. The change can not be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however long continued, can not work the change. There must be *animus* to change the prior domicile for another. Until the new one is acquired the old one remains.[3] The fact that a man ab-

[17] *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Coller, 111 Fed. Rep. 503, 7 Am. B. R. 131; *In re* Everleth, 129 Fed. Rep. 620, 12 Am. B. R. 236.

[18] *In re* Coffman, 93 Fed. Rep. 422, 1 Am. B. R. 530.

[19] *In re* Myers, 102 Fed. Rep. 869, 4 Am. B. R. 536.

But see *In re* Olewine, 125 Fed. Rep. 840, 11 Am. B. R. 840.

[20] Holden v. Stratton, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94.

[1] Bouvier's Law Dic., subject, "Domicil"; Century Dic., subject, "Domicile"; Mitchell v. United States, 21 Wall. 352-3, 22 L. Ed. 584; Morris v. Gilmer, 129 U. S. 328, 32 L. Ed. 690.

[2] Desmare v. United States, 93 U. S. 610, 23 L. Ed. 959.

[3] Morris v. Gilmer, 129 U. S. 328, 32 L. Ed. 690; Mitchell v. United

sconds to avoid arrest, leaving his family behind, does not change his domicile.[4]

The domicile of a corporation can only be in the state by which it was created.[5] A corporation can not change its domicile.[5]

The domicile which determines what state law of exemption applies, is the domicile which the bankrupt has had for more than three of the six months immediately preceding the filing of the petition. If he has not had a domicile for more than three months in any one state during this period, he is not entitled to exemptions. The law of no state applies to such a case. It may be contended that where a bankrupt has had a domicile in one state for more than three months, and has then removed his domicile into another state, and within three months thereafter a petition in bankruptcy is filed, that he has forfeited his right to claim exemptions. The statute does not seem to be so limited. A bankrupt can establish only one domicile within the six months immediately preceding the filing of the petition. It would seem that the law of the state in which he had this domicile, whether it be the first or the last part of the six months, would determine what state law applies.

Where a person has established a domicile in a state, the burden is upon the creditor opposing claim to exemption on the ground that the bankrupt has changed his domicile.[6]

§ 178. Constitutionality of clause providing for exemptions.

It can not be seriously urged against the constitutionality of Section 6 of the act, adopting the state exemption laws, that congress is without power to grant exemptions to the

States, 21 Wall. 353, 22 L. Ed. 584; Bouvier's Dic., subject, "Domicil"; *In re* Schulz, 135 Fed. Rep. 228, 14 Am. B. R. 317.

[4] *In re* Filer, 108 Fed. Rep. 209, 5 Am. B. R. 332.

[5] Bank of Augusta v. Earl, 13 Pet. 585, 10 L. Ed. 274; Lafayette Insurance Co. v. French, 18 How. 404, 15 L. Ed. 451; Shaw v. Quincy Mining Co., 145 U. S. 450, 36 L. Ed. 768.

[6] *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160.

bankrupt.[1] The power of congress in this respect, as with reference to other matters relating to the subject of the bankruptcies, is plenary and has no limitation but the discretion of congress and uniformity.[2]

Under the act of 1867, as amended,[3] there was at one time considerable discussion in regard to the constitutionality of a clause allowing exemptions under the state laws.[4] The ground of the objection was that the constitution of the United States gave congress power to establish a uniform system of bankruptcy. The exemptions prescribed by the various state laws differ widely in the amount and species of property exempted, and also in the requirements. It was contended that this occasioned a lack of uniformity in the bankrupt law. It may be considered, however, settled that the uniformity required by the constitution relates to national legislation only, and therefore the laws of the several states regulating exemptions may be left in force so long and to such an extent as congress may see fit.[4]

§ 179. Title to exempt property.

As a general rule, property exempted by the laws of the several states may be divided into two classes: *first,* specific lands or chattels where selection is not required or has been exercised, and, *second*, exemptions which consist of certain articles to be selected from many, or of property to a certain valuation to be set apart from a large quantity. In some

[1] Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re* Kean, No. 7630 Fed. Cas., 2 Hughes, 322; *In re* Smith, No. 12986 Fed. Cas., 8 N. B. R. 401.

[2] U. S. Const., Art. I., Sec. 8. See Powers of congress, Chap. II., *ante.*

[3] R. S. Sec. 5045.

[4] Hanover National Bank v. Moyses, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; Darling & Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed Cas., 1 Dill. 45; *In re* Jordan, No. 7514 Fed. Cas., 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., 10 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., 2 Hughes 322; *In re* Everitt, No. 4579 Fed. Cas., 9 N. B. R. 90.

Contra, In re Deckert, No. 3728 Fed. Cas., 2 Hughes 183; *In re* Duerson, No. 4117 Fed. Cas., 13 N. B. R. 183.

states the homestead must be selected and designated in advance of the proceedings against the debtor. In such cases it belongs to the first class of exemptions. In case the homestead may be selected at any time it belongs to the second class.

The title to exempt property does not pass to the trustee.[1] Property which is specifically designated by the state statute, or which has been set apart by the trustee, may be considered exempt property. The title to such property is in the bankrupt.[2] He may sell it or mortgage it or maintain suits in respect to it, as for the recovery of it in specie or for any damages or wrongs done in respect to it.[3] Where a transfer of exempt property has been surrendered as a preference the title is then in the bankrupt, and he may claim his exemption in it.[4] Upon the death of the bankrupt exempt property descends to his heirs according to the law of the state.[5]

Property of the second class can not be considered exempt property until it is selected and set apart.[6] It must neces-

[1] B. A. 1898, Sec. 70*a*, vests title in property, except what is exempt. *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760, 2 N. B. N. 1101; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308, 3 N. B. N. 233; *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117; *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57; Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107.

[2] Schlitz v. Schatz, No. 12459 Fed. Cas., 2 Biss. 248; *In re* Hunt, No. 6883 Fed. Cas., 5 N. B. R. 493; Bush v. Lester, 55 Ga. 579, 15 N. B. R. 36; *In re* Hester, No. 6437 Fed. Cas., 5 N. B. R. 285; Felker v. Crane, 77 Ga. 484; Wilkinson v. Waite, 44 Vt. 508; Simpson v. Houston, 97 N. C. 344.

[3] Winn v. Morse, 59 N. H. 210; Sulling v. Gunderman, 35 Tex. 545; Henly v. Lanier, 75 N. C. 172; Schlitz v. Schatz, No. 12459 Fed. Cas., 2 Biss. 248.

[4] *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513, affirming *In re* Talbott, 116 Fed. Rep. 417, 8 Am. B. R. 427; but see *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451.

[5] *In re* Hester, No. 6437 Fed. Cas., 5 N. B. R. 285; *In re* Lambert, No. 8026 Fed. Cas., 2 N. B. R. 426; Rix v. Bank, 11869 Fed. Cas., s. c. 2 Dill. 367; Bullymore v. Cooper, 46 N. Y. 236; Fehley v. Barr, 66 Penn. 196.

[6] Woolfolk v. Murray, 44 Ga. 137-8.

sarily pass to the trustee.[7] It may never be selected or set apart as an exemption. It can not be determined in advance precisely what property, if any, will be set apart. The trustee must have temporary dominion over it in order that the exemption may be measured and set apart by him. He may be said to take a defeasible title to such property. When it is so designated and set apart as exempt, the title of the trustee is defeated by the superior title of the bankrupt.[8] Where a homestead exemption is disputed and doubtful the title may be treated as in the trustee subject to the determination of the question, and if it abandoned by the bankrupt it vests absolutely in the trustee.[9] The proper way to determine whether or not disputed property is exempt is for the trustee to report it to the referee as exempt or not exempt, to which report the aggrieved party should take exceptions.[10]

§ 180. Jurisdiction of a court of bankruptcy over exempt property.

The statute expressly authorizes a court of bankruptcy to determine all claims of bankrupts to their exemptions.[1] It is the duty of the bankrupt to make a claim for such exemptions as he may be entitled to in the schedule filed by him.[2] A voluntary bankrupt should claim his exemptions at the tme of filing the petition.[3] It devolves upon the trustee, and it is his duty, to set apart the bankrupt's exemptions and report the

[7] *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801.

[8] *In re* Hatch, 102 Fed. Rep. 280, 4 Am. B. R. 349; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308.

[9] *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 6 Am. B. R. 117.

[10] *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641.

[1] B. A. 1898, Sec. 2, clause 11; McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641.

[2] B. A. 1898, Sec. 7, clause 8.

[3] *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Lucius, 124 Fed. Rep. 455, 10 Am. B. R. 653.

items and estimated value thereof to the court as soon as practicable after his appointment.[4]

From this it would seem that the jurisdiction of the court of bankruptcy in regard to exempt property is limited to determining the claims and designating and setting apart such property.[5] A state court will not review the decision of a court of bankruptcy as to what property is properly exempted by the state law.[6] When the property is so designated and set apart it does not pass to the trustee, nor is it subject to be administered by the court as a part of the bankrupt's estate.[7] But where no specific property has been set off to the bankrupt the bankruptcy court has jurisdiction to determine all liens claimed.[8] But a court of bankruptcy has no power to order the sale of a homestead, exempt under the state law, to pay a creditor who has a claim or lien on it.[9]

Although the trustee never obtains title to exempt property, he must at least have temporary dominion over it in order that the exemption may be measured and set apart by him.[10] When the exemption consists of one article to be selected from many, or of property of a certain valuation to be set apart from a large quantity, it would seem that the possession and control must pass for the time being to the trustee. In case the exemption is of some specific chattel or chattels, where neither selection nor valuation is required, there is not an equal reason for the trustee to have possession.

[4] B. A. 1898, Sec. 47, clause 11; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801.

[5] Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re* Swords, 112 Fed. Rep. 661, 7 Am. B. R. 436; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798.

[6] Maxwell v. McCune, 37 Tex. 515; Woolfolk v. Murray, 44 Ga. 133.

[7] B. A. 1898, Sec. 70*a*. Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R 107. See Title to exempt property, Sec. 179, *ante*.

[8] *In re* Lucius, 124 Fed. Rep. 455, 10 Am. B. R. 653.

[9] Ingram v. Wilson (C. C. A. 8th Cir.), 125 Fed. Rep. 913, 11 Am. B. R. 192; *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681; *In re* Wells, 105 Fed. Rep. 762, 5 Am B. R. 308.

[10] Sheldon v. Rounds, 40 Mich. 427; see Title to exempt property, Sec. 179, *ante*.

After the exempt property has been designated and set apart by the trustee, it has been administered and has passed out of the possession and control of the court. The trustee and the creditors have no further concern with it. The court has no jurisdiction to defend such property from adverse claims or liens that may or may not be extinguished by the bankruptcy proceedings [11] nor to order the sale of a bankrupt's homestead.[12] It will not entertain a proceeding to enforce a lien upon such property,[13] nor has it jurisdiction to determine the effect of waiver notes and the rights of creditors holding such obligations.[13] The decision of the rights of parties properly belongs to the tribunals of the state under the laws of which they are claimed. The court of bankruptcy may postpone the granting of a discharge until a person who claims the property as against the bankrupt can settle his rights in a state court [14] or may restrain its own officials or persons subject to its jurisdiction from interfering with the exempt property. It will not, however, assist the bankrupt in enforcing his rights to such property beyond preventing such interference with it. Such questions are, as has been stated above, left to the state courts.

§ 181. Liens on exempt property.

The object of the bankrupt statute in allowing exemptions to the bankrupt is to set apart a portion of the property in

[11] Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; Jeffries v. Bartlett, 20 Fed. Rep. 496.

[12] Ingram v. Wilson (C. C. A. 8th Cir.), 125 Fed. Rep. 913, 11 Am. B. R. 192.

[13] Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308, 3 N. B. N. 233; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165.

But see *In re* Sisler, 96 Fed. Rep. 402, 2 Am. B. R. 760; *In re* Woodruff, 96 Fed. Rep. 317, 2 Am. B. R. 678; *In re* Garden, 93 Fed. Rep. 423, 1 Am. B. R. 582.

[14] Lockwood v. Exchange Nat. Bank, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 782.

the schedule of the bankrupt for his use free from the claims of creditors. The title to property exempted by the state laws in specie can never pass to the trustee. The bankrupt may deal with it as he sees fit. All liens on such property remain unimpaired and unaffected by bankruptcy proceedings. The rights of lien-holders are a special property which the bankrupt law does not take away. Such liens are enforceable in the state courts against such property.[1] The taking of exempt property upon execution before the commencement of bankruptcy proceedings does not constitute a valid lien and will not prevent such property being set off to the bankrupt.[2]

Where property to a certain valuation, to be selected by the bankrupt, is exempted, as a homestead or an equivalent, it is set off to the bankrupt free from all claims of creditors.[3] If the bankrupt selects property to be exempted as required by the state law, it does not pass to the trustee as a part of the bankrupt's estate. But if the bankrupt does not comply with the requirements of the state law, the property will pass to the trustee to be distributed among the creditors like other assets of the bankrupt.[4] Where the selection is properly and duly made, the question frequently arises with reference to what effect liens on such property may have. If the property of the bankrupt is encumbered by liens the court may order the property sold. The bankrupt will then be entitled to

[1] Rix v. Capitol Bank, No. 11869 Fed. Cas., 2 Dill. 367; Schlitz v. Schatz, No. 12459 Fed. Cas., 2 Biss. 248; Fowler v. Wood, 26 S. C. 169; Haworth v. Travis, 67 Ill. 301; Jackson v. Allen, 30 Ark. 110; Cumming v. Clegg, 52 Ga. 605; Hatcher v. Jones, 53 Ga. 208; *In re* Lambert, No. 8026 Fed. Cas., 2 N. B. R. 426; Tuesley v. Robinson, 103 Mass. 558.

[2] *In re* Martin, No. 9152 Fed. Cas., 2 Hughes, 418; *In re* Owens, No. 10632 Fed. Cas., 6 Biss. 432.

[3] *In re* Brown, No. 1980 Fed. Cas., 3 N. B. R. 250; *In re* May, No. 9326 Fed. Cas., 2 Cin. Law Bul. 152; *In re* Jones, No. 7445 Fed. Cas., 2 Dill. 343.

[4] *In re* Farish, No. 4647 Fed. Cas., 2 N. B. R. 168; *In re* Gainey, No. 5181 Fed. Cas., 2 N. B. R. 525; *In re* Jackson, No. 7127 Fed. Cas., 2 N. B. R. 508; *In re* Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re* West, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re* Stephens, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re* Boorstin, 114 Fed. Rep. 696, 8 Am. B. R. 89. See Title to exempt property, Sec. 179, *ante*.

claim exemptions out of the fund arising from the sale of the equity of redemption, or to select the property to the value allowed by the state law.[5] The effect of liens on exempt property and the right to select property to be exempted depends solely upon the law of the state in which the bankrupt has his domicile. It may be stated as a general rule that a mechanic's lien for improvements and a vendor's lien[6] are superior to a homestead exemption in land, and that other liens are subordinate to it.

To illustrate the general rule, suppose that a bankrupt owns two lots of land, A and B, and both of them are mortgaged; that upon the sale under an order of the court of bankruptcy there is a surplus over and above paying the mortgage debt on lot "A"; that lot "B" does not sell for enough to pay the mortgage debt; and that judgments against the bankrupt have attached as liens on the land. The order of payment would be as follows: The mortgagee of lot "A" would be paid in full. The mortgagee of lot "B" would take the proceeds of the sale and become a general creditor to the extent of the balance of his debt. The bankrupt would be entitled to his exemption from the sale of the equity of redemption in lot "A," or the balance of the proceeds after paying the mortgage debt. If there be still a balance of proceeds, the judgment lien-holders should next be paid in order of their priority. This illustrates the general rule with reference to the effect of liens upon exempt property. It is, however, subject to be varied by the law of a particular state.

§ 182. Who may claim exemptions.

The right to claim exemptions is personal to the bankrupt and his family. The claim is regularly made by the bankrupt himself. He may, however, claim his exemption through his agent or attorney.[1] In the absence or disability of the hus-

[5] *In re* May, No. 9326 Fed. Cas., 2 Cin. Law Bul. 152; *In re* Jones, No. 7445 Fed Cas., 2 Dill. 343.

[6] *In re* Perdue, No. 10975 Fed. Cas., 2 N. B. R. 183; *In re* Whitehead, No. 17362 Fed. Cas., 2 N. B. R. 599; Fehley v. Barr, 66 Pa. 196.

[1] Regan v. Zeeb, 28 Ohio St. 483; Wilson v. McElroy, 32 Pa. St. 82.

band, the wife or children may present the claim.[2] No other person can assert the right of exemption, unless possibly a mortgagee of exempted property, where the exemption is waived in or by the mortgage.[3] Neither a bankrupt nor his wife can claim exemptions by courtesy or dower in the lifetime of the other.[4] It should be borne in mind that the court is to look to the laws of the several states and territories for the description of the person who may claim exemptions. The rules stated above will apply under most, if not all, of these laws.

§ 183. Waiver of exemption.

The statute expressly makes it the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.[1] This he should do. If the bankrupt fails to make a claim for his exemptions in his schedule, does he thereby waive his right to claim them?

A bankrupt can not waive his right of exemption in property specifically set apart to him by the statute so that the trustee can acquire title to it for the benefit of the estate, unless he expressly conveys it to the trustee. It does not pass by operation of law.[2] It may be doubted if, as a general rule, he will be deemed to waive his right to claim exemptions out of property to be selected by him by simply failing to make the claim in his schedule. If the claim is not made in the schedule an amendment will usually be allowed,[3] but

[2] Smith v. Kehr, No. 13071 Fed. Cas., 2 Dill. 50, affirmed 20 Wall. 31, 22 L. Ed. 313; *In re* Pratt, No. 11370 Fed. Cas., 1 Flip. 353. This is the subject of special enactment in some of the states.

[3] Edmondson v. Hyde, No. 4285 Fed. Cas., s. c. 2 Saw. 205.

In Wisconsin mortgagee can not claim such exemption. *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278.

[4] *In re* McKenna, 9 Fed. Rep. 27; Kelly v. Strange, No. 7676 Fed. Cas., s. c. 3 N. B. R. 8.

[1] B. A. 1898, Sec. 7, clause 8.

[2] B. A. 1898, Sec. 70*a*.

[3] *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; *In re* White, 128 Fed. Rep. 513, 11 Am. B. R. 556; *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 5 Am. B. R. 404; *In re* Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re* Berman, 140 Fed. Rep. 761, 15 Am. B. R. 463.

not if the avowed purpose is to pay creditors against whom he has waived exemption.[4] There are cases which hold that where the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after a sale, he must be regarded as having waived his right of exemption.[5] Where, however, a bankrupt claims his exemptions in his schedules as required by the bankrupt act, the mere fact that the goods themselves have been sold by a receiver under direction of the court as perishable, will not deprive him of the right to come in upon the proceeds.[6] He must make the claim in a court of bankruptcy before his discharge.[7] He will not be permitted to assert such a claim in a state court subsequent to his discharge.[8] The right to claim exemption has been denied a bankrupt after being a fugitive from justice for ten years.[9]

As a general rule it may be stated that where a debtor would be held to have waived his right to exemptions in a proceeding in a state court he will probably be held to have waived it in a court of bankruptcy. The general doctrine is recognized in most states that an exemption is a personal privilege and that debtors may waive it by contract or surrender or by neglecting to claim it before the sale.[10] Where no

[4] Moran v. King, 111 Fed. Rep. 730, 7 Am. B. R. 176.

[5] *In re* Von Kerm, 135 Fed. Rep. 447, 14 Am. B. R. 403; *In re* Manning, 112 Fed. Rep. 949, 7 Am. B. R. 571; *In re* Wunder, 133 Fed. Rep. 821, 13 Am. B. R. 701; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re* Haskins, 109 Fed. Rep. 789, 6 Am. B. R. 485.

[6] Lipman v. Stein (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 14 Am. B. R. 30, affirming 130 Fed. Rep. 629, 12 Am. B. R. 384; *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 11 Am. B. R. 533; *In re* LeVay, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re* Sloan, 135 Fed. Rep. 873, 14 Am. B. R. 435.

[7] *In re* Kean, No. 7630 Fed. Cas., 2 Hughes, 322.

[8] Steele v. Moody, 53 Ala. 418; Gayle v. Randall, 71 Ala. 469; Woolfolk v. Murray, 44 Ga. 133; Maxwell v. McCune, 37 Tex. 515.

[9] *In re* Moyer, 15 Fed. Rep. 598.

[10] Consult Spitley v. Frost, 15 Fed. Rep. 304 (this case was reversed on another point in 121 U. S. 552, 30 L. Ed. 1010; Green v. Blunt, 50 Ia. 79; Pond v. Kimball, 101 Mass. 105; Wicker v. Comstock, 52 Wis. 315; People v. Pal-

claim for an exemption is made in the progress of a case and before there is judgment, execution and a sale, the debtor is usually deemed to have waived his right of exemption in the property sold. He may, however, assert his claim at any time before the sale of the property.[11]

A waiver in favor of some particular creditors can not be made to inure to the benefit of the general creditors.[12] A debtor may waive his exemption in favor of one creditor and insist upon it as against another. The creditor in whose favor the exemption is waived may proceed in the state court against the exempt property after it is set apart to the bankrupt.[13] In such cases the bankruptcy court will usually withhold a discharge until such suits are ended, where a discharge would bar the debt.

A bankrupt may forfeit his right to an exemption by fraud. Thus where a bankrupt gave a deed of trust as security for money then loaned to him and for future advances, and afterwards declared a homestead on one of the lots so conveyed in trust, and subsequently obtained further advances without disclosing the fact that he had declared a homestead on the premises, he was not allowed to claim his exemption.[14] Where a bankrupt conceals a great part of his property and takes it out of the jurisdiction, he can not claim exemptions out of

mer, 46 Ill. 398; Clapp v. Thomas, 5 Allen (Mass.), 158; Hewes v. Parkman, 20 Pick. (Mass.) 90; McKinney v. Reader, 6 Watts, 34; Hutchinson v. Campbell, 25 Pa. St. 273; Lauck's Appeal, 24 Pa. St. 426; Hammer v. Freese, 19 Pa. St. 255; Bowyer's Appeal, 21 Pa. St. 210; Case v. Dunmore, 23 Pa. St. 93; Brackett v. Watkins, 21 Wend. (N. Y.) 68.

[11] Bartholomew v. West, No. 1071 Fed. Cas., 2 Dill. 290; Slaughter v. Detiney, 15 Ind. 49; McClusky v. McNeely, 8 Ill. 578; Shepherd v. Murrill, 90 N. C. 208. See also Weaver's Appeal, 18 Pa. St. 307; Yost v. Heffner, 69 Pa. St. 68; Toenes v. Moog, 78 Ala. 558.

[12] *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171, 3 N. B. N. 447; *In re* Black, 104 Fed. Rep. 289, 4 Am. B. R. 776, 3 N. B. N. 47; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165; but see *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263; *In re* Nye (C. C. A. 8th Cir.), 133 Fed. Rep. 33, 13 Am. B. R. 142.

[13] McKenney v. Cheney, 118 Ga. 387; Bell v. Dawson, 120 Ga. 628.

[14] *In re* Haake, No. 5883 Fed. Cas., 2 Saw. 231.

his remaining property.[15] A bankrupt can not while insolvent build a house with money derived from goods not paid for and then claim it as a homestead.[16] A bankrupt is not, however, deprived of his right to a homestead exemption merely because, while insolvent, he moved into the house for the purpose of claiming it as exempt.[17]

Under the statute of Washington, which in case of a sale in bulk of a stock of merchandise makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller by making such a sale must be deemed to have assented to such application, and on his adjudication as a bankrupt can not claim his statutory exemptions out of the money due from the purchaser.[18] Nor do the creditors waive their rights in such fund by instituting involuntary proceedings in bankruptcy against him.[18]

When there are no other assets the bankrupt must pay costs out of exempt property.[19]

§ 184. Waiver to exemption in property fraudulently conveyed.

Does a bankrupt waive his right to claim an exemption in property which he had conveyed in fraud of creditors prior to the commencement of bankruptcy proceedings, and which the trustee subsequently recovered for the benefit of the estate? There is a conflict of authority on this point. The better

[15] *In re* Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410.

[16] McGahan v. Anderson (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 7 Am. B. R. 641. See also *In re* Schnechter, 9 Am. B. R. 729; Cannon v. Dexter, etc., Co. (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 9 Am. B. R. 724; *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re* Butler, 120 Fed. Rep. 100, 9 Am. B. R. 539. These cases depend largely on the construction of state statutes.

[17] *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 416; Huenergardt v. Brittain Dry Goods Co. (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 8 Am. B. R. 341.

[18] *In re* Connor, 146 Fed. Rep., 998.

[19] *In re* Hines, 117 Fed. Rep. 790, 9 Am. B. R. 27; *In re* Collier, 93 Fed. Rep. 191, 1 Am. B. R. 182; *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 53.

reason seems to support the rule that the bankrupt does not waive his right to claim a homestead exemption in lands so conveyed and recovered.[1]

The argument in favor of this rule may be briefly stated. Homestead laws are favorably construed by the courts in the interest of the debtor's family. It is true that the debtor may have conveyed his homestead right and would be estopped to claim it as against his grantee or any person claiming under him. The trustee does not claim under the deed of conveyance, but in hostility to it. The property is recovered by the trustee as representative of the creditors. When so recovered the deed is declared to be null and void as between the bankrupt and the trustee. Surely the trustee can not claim to be subrogated to any rights of the grantee. His rights are the same that they would have been had the deed never been made. If the bankrupt had the right of exemption as against creditors before the deed was made, he is not estopped, as against the trustee, to claim the right to the homestead or the value to the extent given by the statute. It does not make the estate any less than if the fraudulent conveyance had not been made. An opposite view would give the creditors a profit out of the attempted fraud at the expense of the bankrupt's family.

There are cases, however, which hold that the bankrupt waives his right to an exemption in property fraudulently

[1] McFarland v. Goodman, No. 8789 Fed. Cas., 6 Biss. 111; Cox v. Wilder, No. 3308 Fed Cas., 2 Dill. 45, reversing No. 3309 Fed. Cas., 5 N. B. R. 443; Smith v. Kehr, No. 13071 Fed. Cas., 2 Dill. 50; Bartholomew v. West, No. 1071 Fed. Cas., 2 Dill. 290; Penny v. Taylor, No. 10957 Fed. Cas., 10 N. B. R. 200; *In re* Poleman, No. 11247 Fed. Cas., 5 Biss. 526; *In re* Detert, No. 3829 Fed. Cas., 11 N. B. R. 293; Vogler v. Montgomery, 54 Mo. 577; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432, 2 N. B. N. 981; *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 5 Am. B. R. 404, 3 N. B. N. 454; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557; Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513, affirming *In re* Talbott, 116 Fed. Rep. 417, 8 Am. B. R. 427; *In re* Thompson, 140 Fed. Rep. 257, 15 Am. B. R. 283.

As to the effect of a fraudulent conveyance upon the right of dower, see Scribner on Dower, Chap. IX.

conveyed by him.[2] The argument in favor of this position is substantially as follows: The deed is valid between the bankrupt and his grantee. He thereby extinguishes his homestead interest. Whatever passed to the grantee remains subject to the creditors' demands. The grantee can not hold against adjudged fraud. The grantor can not reclaim his grant. The annihilation of the homestead by the bankrupt leaves the premises like any other realty owned by the grantor to which no pretense of a homestead interest ever obtained. It inures to the benefit of the creditors whom it was sought to defraud.

There seem to be two principal objections to this rule. *First,* The creditors are benefited by a provision of a deed which must be held invalid as between the bankrupt and the creditors in order that the property may be recovered at all by the trustee; and, *second,* because it gives the creditors a profit out of the attempted fraud at the expense of the family, for whose benefit the exemption is mainly, if not wholly, provided. If the law gave to a single man the right to this exemption, it might accord with the natural desire to punish fraud to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family subverts the policy on which the exemption is provided and allowed.

A bankrupt will not usually be deemed to have waived his right to a homestead exemption by previously waiving his homestead rights in mortgaged property in favor of a particular creditor.[3] The reason for this is that the waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the trustee in bankruptcy for the creditors.

[2] *In re* Graham, No. 5660 Fed. Cas., 2 Biss 449; Keating v. Keefer, No. 7635 Fed. Cas., s. c. 5 N. B. R. 133; Cox v. Wilder, No. 3309 Fed. Cas., 5 N. B. R 443, which was reversed by the circuit court in No. 3308 Fed. Cas., 2 Dill. 45; *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451; *In re* Coddington, 126 Fed. Rep. 891, 11 Am. B. R. 122.

[3] *In re* Poleman, No. 11247, Fed. Cas., 5 Biss. 526; Rix v. Capitol Bank, No. 11869 Fed. Cas., 2 Dill. 367. See *In re* Garner, 115 Fed. Rep. 200, 8 Am. B. R. 263.

A bankrupt is not entitled to claim as exempt property which he has acquired by fraud.[4]

§ 185. Dower.

The bankrupt statute expressly provides that in case of the death of the bankrupt the widow and the children are entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence.[1] The effect of this provision is to preserve the right of dower in the bankrupt's estate after the title has passed from the bankrupt to the trustee.[2] It is a mere declaration of a well-recognized principle of law and of the construction, which the bankrupt act of 1867 received without any such proviso.[3]

Whether the contingent or inchoate right of dower attaches to property in hands of the trustee depends upon the law of the state of the bankrupt's residence. This becomes important if the trustee has occasion to convey any real estate, either for the purpose of reducing it to money or to free it from mortgage or other liens and charges, or for any purpose whatever. How may the trustee make such a conveyance as to pass title to real estate free of all claims of dower? The general rule in this respect may be thus stated:

[4] *In re* Woollcott, 140 Fed. Rep. 460, 15 Am. B. R. 386.

[1] B. A. 1898, Sec. 8.

The act of 1867 contained no such provision. The act of August 19, 1841, Sec. 2 (5 Stat. at L.), contained a provision similar to the presena act, viz.: "Nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, which may be vested by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." See also Worcester v. Clark, 2 Grant (Pa.) 84.

[2] *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 92*n*.

In re Buckingham, 102 Fed. Rep. 972. A widow had waived her right to homestead exemption in certain property and the property was sold. She was allowed subsequently to claim a homestead exemption out of the proceeds of the sale of other real estate in the hands of the trustee in bankruptcy.

[3] Porter v. Lazear, 109 U. S. 89, 27 L. Ed. 865, affirming 87 Pa. St. 513; Speake v. Kinard, 4 S. C. 54; *In re* Angier, No. 388 Fed. Cas., 4 N. B. R. 619; *In re* Bartenbach, No. 1068 Fed. Cas., 11 N. B. R. 61; Dwyer v. Garlough, 31 Ohio St. 158; Warford v. Noble, 2 Fed. Rep. 202; Warford v. Clark, 2 Grant (Pa.) 84.

In those states in which the wife is entitled to dower only lands owned by her husband during coverture, the trustee may convey any lands held by him free of dower during the lifetime of the bankrupt.[4] The wife's right of dower will attach only to such real property as remains in the hands of the trustee at the time of the death of the bankrupt. She has no contingent right of dower in lands of the bankrupt prior to that time. The bankrupt could have sold them free of dower, and the trustee is in the same position. The wife has no greater claims against the trustee than she would have against her husband had bankruptcy proceedings not intervened.

In those states in which the wife is entitled to dower in all lands owned by her husband during coverture, the trustee may proceed to sell free of dower only when the wife consents to the sale and asks to have an equivalent of her contingent right of dower set off to her in money. In such case the trustee may convey lands free of dower.[5] The value of her contingent interest or inchoate right of dower is computed usually by tables for finding the present value of such interest.[6] If the wife refuses consent, the property can be sold only subject to her right of dower.[7]

Dower and homestead rights are governed by substantially the same rules and priniciples.[8] What has been said with reference to exemptions in this chapter will assist in answering many questions which may arise with reference to dower.[9]

§ 186. How to set apart exemptions.

The exemptions provided by the law of the state are allowed by the bankruptcy act, but the manner of claiming such

[4] Kelly v. Strange, No. 7676 Fed. Cas., 3 N. B. R. 8.

[5] *In re* Bartenbach, No. 1068 Fed. Cas., 11 N. B. R. 61.

[6] Consult Giauque & McClure's Present Value Tables.

[7] Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865.

[8] B. A. 1898, Sec. 6; Cox v. Wilder, No. 3309 Fed. Cas., s. c. 5 N. B. R. 443, reversed in No. 3308 Fed. Cas., 2 Dill. 45; McFarland v. Goodman, No. 8789 Fed. Cas., 6 Biss. 111.

[9] As to dower in partnership property, consult Exemptions in partnership property, Sec. 187, *post.*

exemptions and of setting apart and awarding them is regulated by the bankruptcy act.[1]

It is made the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.[2] It devolves upon the trustee, and it is his duty, to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court within twenty days after receiving notice of his appointment.[3] Where no trustee has been appointed the court may set apart the exemptions.[4] The trustee has no discretion with reference to what property shall be exempt. The right of the bankrupt is absolute and fixed by the law of the state in which he has his domicile for the greater part of the six months immediately preceding the filing of the petition.[5]

The trustee regularly allows the claim of the bankrupt to and sets apart such articles as are specifically exempted by the statute of that state, regardless of their value or the situation of the bankrupt. He should also set apart the homestead, or the value thereof, and such articles as the bankrupt may be entitled to select under the state law. The trustee should, as soon thereafter as possible, file with the

[1] *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552; 11 Am. B. R. 533; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; Lipman v. Stein (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 14 Am. B. R. 30; Burke v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 134 Fed. Rep. 562, 14 Am. B. R. 31.

[2] B. A. 1898, Sec. 7, clause 8; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Lucius, 124 Fed. Rep. 455, 10 Am. B. R. 653.

A bankrupt was refused leave to amend in *In re* Moran, 105 Fed. Rep. 901, 5 Am. B. R. 472. He was permitted to amend his schedule in this respect in *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 5 Am. B. R. 404, 3 N. B. N. 454; *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 6 Am. B. R. 557.

[3] B. A. 1898, Sec. 47, clause 11; Gen. Ord. 17; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 3 Am. B. R. 801; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432.

[4] *In re* Smalley v. Langenour, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692, and *In re* Allen & Co., 134 Fed. Rep. 620, 13 Am. B. R. 518, a homestead exemption was allowed by a referee.

[5] B. A. 1898, Sec. 6.

referee an itemized report of the property thus set apart.[6] General Order 17 requires the specification of the separate articles and their separate appraisement.[7] His act in setting aside the exemptions claimed is ministerial, and no issue on the question of the bankrupt's right to them is raised until his report is filed.[8] The creditors may then raise this issue by taking exceptions to the report within twenty days.[9] A creditor who has received notice of the filing of the petition and that he is a scheduled creditor is charged with notice of whatever transpires in the administration of the estate and a failure to contest the bankrupt's claim for exemptions is such laches as will deprive him of the right to reopen the matter.[10] The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt.[11] The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office.[12]

Ordinarily exemptions can not be set off until after the trustee is appointed, but where no creditors appear at the first meeting and no trustee is appointed the court can probably allow the exemptions on satisfactory proof.[13] A bankrupt may be allowed to take property claimed to be exempt, be-

[6] Official Form No. 47; see Form No. 91, *post*.

[7] *In re* Manning, 112 Fed. Rep. 948, 7 Am. B. R. 571.

[8] *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. 723.

[9] Gen. Ord. 17; *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190.

[10] *In re* Reese, 115 Fed. Rep. 993, 8 Am. B. R. 411.

[11] *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549.

[12] Gen. Ord. 17. See Removal of trustees, Sec. 145, *ante*.

[13] *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730; *In re* Allen & Co., 134 Fed. Rep. 620, 13 Am. B. R. 518.

fore it is set apart by the trustee, upon giving a forthcoming bond for its return.[14] The more usual practice in such cases is to put in the claim for exemptions and allow the property to be sold and have the exemptions set apart out of the proceeds of the sale.[15] It has been held that the costs of such sale could not be deducted from exemptions.[16]

If it becomes necessary to appraise exempt property for the purpose of setting it off it may be appraised like other property of the bankrupt by three disinterested appraisers appointed by the court.[17] In some cases the trustee has appointed appraisers who have appraised the property claimed to be exempt and reported to the court. In other cases the trustee has followed the practice of the state in this respect. In one case it was held that there was no authority for an appraisement and that the allotment must be made by the trustee without the assistance of appraisers.[18] When, however, a homestead has been set off under a state law, the court of bankruptcy may adopt it without a new appraisement.[19] When the property can not be divided it may be sold and the exemption allowed out of the proceeds.[20] Where the exempted property has been sold by the trustee the proceeds may be given to the bankrupt.[21] If any controversy arises with the

[14] *In re* Shaffer & Son, 128 Fed. Rep. 986, 11 Am. B. R. 717.

[15] Lipman v. Stein (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 14 Am. B. R. 30, affirming 130 Fed. Rep. 629, 12 Am. B. R. 384; *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 11 Am. B R. 533; *In re* Le-Vay, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re* Sloan, 135 Fed. Rep. 873, 14 Am. B. R 435.

[16] *In re* Le Vay, 125 Fed. Rep. 990, 11 Am. B. R. 114.

[17] B. A. 1898, Sec. 70*b*. *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

In re McCutchen, 100 Fed Rep. 779, 4 Am. B. R. 81, the court directed the appraisers to be appointed, one to be selected by the bankrupt, one by the trustees and one by the creditors.

[18] *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730.

[19] *In re* Hall, No. 5921 Fed. Cas., 2 Hughes 411; *In re* Vogler, No. 16986 Fed. Cas., 2 Hughes, 297; *In re* Rhodes, 109 Fed. Rep. 117, 6 Am. B. R. 173.

A new allotment may be ordered *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729.

[20] *In re* Brown, No. 1980 Fed. Cas., 3 N. B. R. 250.

[21] *In re* Jones, No. 7445 Fed. Cas., 2 Dill. 343; *In re* Welch, No. 17366

bankrupt with reference to what property is exempt the court should decide the controversy. A practical method for the determination of disputes arising from valuation of property claimed to be exempt is to order the property in question sold, and the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state laws.[22] Homesteads where practicable should be set apart in kind, so where the value of the homestead is in excess of the exemption allowed the bankrupt should be allowed to keep the property on paying the difference.[23] The court of bankruptcy is expressly given power to determine all claims of bankrupts to their exemptions.[24] This would appear to furnish all machinery necessary for determining and setting apart exemptions in the court of bankruptcy independent of the state courts.

Where exempt property has been set apart to the bankrupt the court will not order the bankrupt to restore the property in order that it may be sold for the benefit of a mortgagee.[25] Where the bankrupt claims property as a homestead and proceedings are taken before the referee to subject it to the payment of a prior debt the bankrupt should be allowed an opportunity to set up defenses against such debt.[26]

§ 187. What property is exempt generally.

No property is specifically exempted by the bankrupt statute from being applied to the payment of the bankrupt's

Fed. Cas., 5 Ben. 230; *In re* Ellis, No. 4400 Fed. Cas., 1 N. B. R. 555.

In some states where the exempt property had not actually been set aside before sale, the bankrupt is not entitled to claim from fund. *In re* Haskin, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692.

[22] *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262; *In re* Richard, 94 Fed. 633, 2 Am. B. R. 506; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171, 3 N. B. N. 447; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432, 2 N. B. N. 981; *In re* Brown, 100 Fed. Rep. 441, 4 Am. B. R. 46; *In re* Diller, 100 Fed. Rep. 931, 4 Am. B. R. 45.

[23] *In re* Manning, 123 Fed. Rep. 180, 10 Am. B. R. 498.

[24] B. A. 1898, Sec. 2, clause 11.

[25] *In re* Hatch, 102 Fed. Rep. 280, 4 Am. B. R. 349.

[26] *In re* Bean, 100 Fed. Rep. 262, 4 Am. B. R. 63.

debts. The property exempted is only such as is exempted in behalf of a debtor under the law of the state in which the bankrupt has had his domicile for the greater portion of the six months immediately preceding the filing of the petition.[1]

There are, however, several questions with reference to exemptions generally which will arise in bankruptcy proceedings. Some of these questions may be briefly alluded to at this point.

In Property Fraudulently Conveyed.—The inquiry may be made as to whether a bankrupt is entitled to claim an exemption in property which was conveyed or encumbered with liens in fraud of creditors prior to the commencement of bankruptcy proceedings, and which the trustee has subsequently recovered for the benefit of the estate. There is a conflict of opinion on this point. The better rule seems to be that he may claim a homestead exemption in such lands.[2]

In Property Purchased on the Eve of Bankruptcy.—So also the decisions are conflicting as to whether property which would ordinarily be exempt from seizure on attachment or execution is liable to be administered for the payment of the debts of the bankrupt when such property was purchased on the eve of bankruptcy with the proceeds of other property not exempt.[3] *Quere*, Does the same rule ap-

[1] B. A. 1898, Sec. 6; *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760, 2 N. B. N. 1101.

[2] See Waiver to exemption in property fraudulently conveyed, Sec. 184, and cases there cited in the notes.

[3] Holding that the bankrupt is not entitled to his exemption in such property, see *In re* Boothroyd, No. 1652 Fed. Cas., s. c. 14 N. B. R. 223; *In re* Parker, No. 10724 Fed. Cas., s. c. 5 Sawy. 58; *In re* Wright, No 18067, s. c. 3 Biss. 359; Brackett v. Watkins, 21 Wend. 68; Pratt v. Burr, No 11372 Fed. Cas., s. c. 5 Biss. 36; *In re* Lammer, No. 8031 Fed. Cas., s. c. 7 Biss. 269; *In re* Sauthoff, No. 12380 Fed. Cas., c. c. 8 Biss. 35; Long v. Murphy, 27 Kan. 375.

Contra, In re Henkel, No. 6362 Fed. Cas., s. c. 2 Sawy. 305; Kelly v. Sparks, 54 Fed. Rep. 70; Comstock v. Bechtel, 63 Wis. 656; Jacoby v. Distilling Co., 41 Minn. 227, at p. 230; O'Donnell v. Segar, 25 Mich. 366. See also *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689, affirming *In re* Stone, 116 Fed. Rep. 35, 8 Am. B. R. 416; Huenergardt v.

ply to property purchased after the petition is filed and before the adjudication, since the title remains in the bankrupt until that time?

In Partnership Property.—The general rule is that there is no separate exemption to the individual members of a firm out of undivided partnership property.[4] The exemption is several, personal and individual, as well in regard to the property to which it applies as to the right conferred. The impracticability of granting the exemption out of undivided partnership property grows out of the nature of such property and the relations of partners to each other and to the creditors. Property belonging to a firm can not be said to be the separate property of any member of it. One partner has no exclusive interest in it. It belongs to the other partner or partners as much as it does to him, and can not in whole or in part be appropriated (so long as it remains undi-

Brittain Dry Goods Co. (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 8 Am. B. R. 341.

[4] *In re* Beauchamp, 101 Fed. Rep. 106, 4 Am. B. R. 151; *In re* Lentz, 97 Fed. Rep. 486, 2 N. B. N. 190; *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268; *In re* Demarest, 110 Fed. Rep. 638, 6 Am. B. R. 232; *In re* Blodgett, No. 1555 Fed. Cas., s. c. 10 N. B. R. 145; *In re* Tonne, No. 14095 Fed. Cas., s. c. 13 N. B. R. 170; *In re* Corbett, No. 3220 Fed. Cas., s. c. 5 Sawy. 206; *In re* Price, No. 11410 Fed. Cas., s. c. 6 N .B .R. 400; *In re* Croft, No. 3404 Fed. Cas., s. c. 8 Biss. 188; *In re* Handlin, No. 6018 Fed. Cas., s. c. 3 Dill. 290; *In re* Hughes, No. 6842 Fed. Cas., s. c. 8 Biss. 107; Pond v. Kimbal, 101 Mass. 105; *In re* Stewart, No. 13420 Fed. Cas., s. c. 13 N. B. R. 295; *In re* Boothroyd, No. 1652 Fed. Cas., s. c. 14 N. B. R. 223.

See *contra, In re* Young, No. 18148 Fed. Cas., s. c. 3 N. B. R. 440; *In re* Richardson, No. 11776 Fed. Cas., s. c. 11 N. B. R. 114; *In re* Rupp, No. 12141 Fed. Cas., s. c. 4 N. B. R. 95. But *In re* Rupp was overruled *In re* Corbett, *supra; In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165, under the law of Georgia.

See also *In re* Parks, No. 10765 Fed. Cas., s. c. 9 N. B. R. 270, where a house was built with partnership funds set apart for that purpose. See also *In re* Meriwether, 107 Fed. Rep. 102, 5 Am. B. R. 435.

In Burns v. Allen, 67 N. C. 140, it was held that an exemption might be claimed by one partner out of partnership property with the consent of the co-partners, but not without such consent.

vided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him in the winding up of the business and the settlement of his separate account.

In some states separate exemptions to individual partners are allowed out of the firm property under state law. In such states the bankruptcy courts will allow similar exemptions.[5]

[5] *In Wisconsin.* *In re* Friedrich, 100 Fed. Rep. 284, 3 Am. B. R. 801, affirming 95 Fed. Rep. 282. *In North Carolina.* *In re* Wilson, 101 Fed. Rep. 571, 4 Am. B. R. 260; *In re* Stevenson, 93 Fed. Rep. 789, 2 Am. B. R. 230; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Seabolt, 113 Fed. Rep. 766, 8 Am. B. R. 57. *In Georgia.* *In re* Camp, 91 Fed. Rep. 745, 1 Am. B. R. 165.

See also last note above.

CHAPTER XVIII.

PREFERENCES AND LIENS.

§ 189. The general nature of preferences and liens.

Preferences and liens, as used in the bankrupt law, usually relate to charge upon the property of an insolvent debtor. But an insolvent debtor may have a lien upon the property of another, who may be either solvent or insolvent. The present inquiry is confined to preferences and liens against an insolvent debtor's property.

A preference is defined by the act itself in the following words: "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." [1]

From this definition it appears that a preference may be created by a judgment or a transfer.

By judgment, in this section, is probably meant an order or decree of court upon which is founded process or other proceedings, the object of which is to take hold of the property and withdraw it from the possession and control of the debtor and from the ordinary reach of the creditors for the payment of what is due to them.

A transfer is defined to mean "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." [2]

[1] B. A. 1898, Sec. 60; as amended Feb. 5, 1903, 32 Stat. at L. 797.

[2] B. A. 1898, Sec. 1, clause 25.

A lien, as used in the bankruptcy statute, includes a hold or claim which one person has upon the property of another as a security for some debt or charge. There are common law, statutory and equitable liens. As ordinarily used in the sense of the bankrupt law, liens are included in the definition of a preference.

A preference or a lien may be valid or invalid or voidable. It may be avoided if tainted with fraud, or it may be avoided, although otherwise unobjectionable, because made fraudulent by the provisions of the bankrupt statute.

§ 190. Valid preferences and liens.

The statute expressly recognizes certain preferences, liens or charges to be valid.[1] They are: *First*, taxes legally owing by the bankrupt to the United States, state, county, district or municipality. *Second*, the actual and necessary cost of preserving the estate subsequent to filing the petition. *Third*, the filing fees paid by creditors. *Fourth*, the actual cost of administration. *Fifth*, wages due to workingmen, clerks or servants, which have been earned within three months before the date of commencement of proceedings, not to exceed $300 to each claimant. *Sixth*, a debt owing to any person who by the laws of the states or the United States is entitled to priority. *Seventh*, any preference, valid under local laws, given more than four months prior to the filing of the petition.[2] *Eighth*, any preference created within four months before the filing of the petition where the person to be benefited, or his agent therein, shall not have reasonable cause to believe that it was intended thereby to give a preference; that is to say, a preference which has been acquired in good faith.[3] *Ninth*, liens given or accepted in good faith and not in contemplation of or in fraud upon the act, and for a present consideration, which

[1] B. A. 1898, Sec. 64*b*.

[2] B. A. 1898, Secs. 60*b* and 67*e*, last clause. *In re* West Norfolk Lumber Co., 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re* Mitchell, 8 Am. B. R. 324, 116 Fed. Rep. 87.

[3] B. A. 1898, 60*b* and 67*c*.

have been recorded according to law, if record thereof was necessary in order to impart notice.[4]

Property upon which there is a valid preference or lien passes to the trustee, if he elects to take it, subject to such equities, liens or incumbrances, whether created by operation of law or by the act of the bankrupt.[5]

The courts of bankruptcy will enforce in the bankruptcy proceedings all rights of persons dealing with the bankrupt prior to his bankruptcy and his general creditors, as they existed at the time of the filing of the petition in bankruptcy. In other words, the courts of bankruptcy will administer the debtor's property, having respect to all claims and liens against it, which are valid under the bankrupt law and the state law at the time of filing the petition in bankruptcy and will avoid such as are invalid. The courts will work out in the bankruptcy proceedings the rights of all the parties as they exist according to law and equity without favor to the debtor or creditors.

§ 191. Invalid preferences and liens.

The bankrupt act provides that certain preferences and liens shall be void or voidable. Such are: *First*, those which are invalid under the state law.[1] *Second*, any preference created within four months before the petition is filed and the person to be benefited has reasonable cause to believe that it was intended thereby to create a preference.[2] *Third*, a lien created by legal proceedings begun within four months before the petition was filed, where the person sought to be benefited had

[4] B. A. 1898, Sec. 67*d*. *In re* West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. Rep. 759.

[5] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Hewitt v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Yeatman v. New Orleans Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816. See also Title to bankrupt's property, Sec. 149, *ante*.

[1] B. A. 1898, Secs. 67 *a* and *e*, last clause.

[2] B. A. 1898, Sec. 60*b*.

reasonable cause to believe that the debtor was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the bankrupt act.[3] And, *fourth,* any levy, judgment, attachment or other lien obtained by legal proceedings within four months prior to the filing of the petition.[4] In addition to these any preference or lien which is tainted with fraud is in itself void, irrespective of the provisions of the bankrupt act. These several liens will be more fully considered in connection with the treatment of the particular subjects immediately following.

Whenever a preference or a lien which is declared fraudulent or invalid under the bankrupt act has been placed upon property, the trustee takes such property discharged and released from such lien or preference.[5] The trustee is authorized to reclaim and recover such property or its value.[6]

§ 192. Liens created by judgments, attachments, levies, etc.

The act provides "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged or released from the same, and shall pass to the trustee as a part of the estate of the bankrupt.[1] This provision applies to voluntary as well as involuntary proceedings in bankruptcy.[2]

This provision does not avoid the levies and liens therein

[3] B. A. 1898, Sec. 67*c*.

[4] B. A. 1898, Sec. 67*f*.

[5] B. A. 1898, Secs. 60, 67 and 70; as amended Feb. 5, 1903; Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290.

[6] B. A. 1898, Sec. 67*f*.

This provision was inserted in the bill for the first time by the conference committee, just before its passage. See statement of conference committee reported to the House of Representatives, June 28, 1898, paragraph XIX, 31 Cong. Record, p. 7205.

[1] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; Brown v. Case (S. C. Mass.), 6 Am. B. R. 744; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206.

referred to against all the world, but only against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt. It has been held that a judgment obtained within four months on a note that waives homestead rights may be enforced against the exempt property of the bankrupt,[3] and that an attachment levied upon a homestead within the four months period is not dissolved.[4] The courts of bankruptcy will usually withhold a discharge pending such litigation, where the discharge would bar the debt. But a discharge will not be withheld where it constitutes no bar to judgment.[5]

In order to avoid or dissolve a levy, judgment, attachment or other lien under Sec. 67*f* of the bankrupt act three things must concur. *First*, a lien must be created through legal proceedings; *second*, it must be created within four months before a petition in bankruptcy is filed, and, *third*, the debtor must be insolvent at the time. If any one of these elements is absent the judgment, levy, attachment or lien is valid and will be so recognized by the courts of bankruptcy.

§ 192a. First: A lien must be created through legal proceedings.

The phrase legal proceedings includes any proceeding in a court of justice by which a party pursues a remedy which the law affords him. As used in Section 67*f* of the bankrupt act it obviously refers to the use of judicial process.[1] It is not confined to any particular form of writ, execution or attachment. It has been applied to proceedings in attachment[2]

[3] McKenney v. Cheney, 118 Ga. 387; Bell v. Dawson Grocery Co., 120 Ga. 628.

[4] Robinson v. Wilson, 15 Kan. 595.

[5] *In re* Weaver, 144 Fed. Rep. 229, 16 Am. B. R. 265.

[1] *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126.

[2] *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Moore, 107 Fed. Rep. 234, 6 Am. B. R. 175; Thompson v. Ragan, 25 Ky. Law Rep. 1684.

and garnishment,[3] to a levy of execution,[4] to a lien created by a judgment,[5] to a seizure of property by a vendor to subject it to the payment of the purchase money,[6] to a seizure of property on a writ of replevin,[7] and to proceedings in aid of execution.[8]

It is essential to invalidate a judgment, levy, attachment or other lien under Sec. 67*f* of the bankrupt act that a lien be created through legal proceedings, which may be had within the four months' period. It is not sufficient that merely a judgment or decree be obtained or judicial process issued and served. It has been expressly ruled by the supreme court that "a judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute which is plainly confined to judgment creating liens."[9] Thus it has been held that judgments to enforce a lien created by the commencement of a judgment creditor's suit,[10] or an attachment lien,[11] or a lien created by garnishment,[12] or a lien created by a judgment,[13] or otherwise valid liens existing prior

[3] *In re* McCartney, 109 Fed. Rep. 629, 6 Am. B. R. 367; *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639.

[4] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703.

[5] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; Mohr & Sons v. Mattox, 120 Ga. 962.

[6] *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574.

[7] *In re* Haynes, 123 Fed. Rep. 1001, 10 Am. B. R. 715; *In re* Hymes Buggy & Imp. Co., 130 Fed. Rep. 977, 12 Am. B. R. 477.

[8] Rodgers & Son v. Forbes & Schoen, 23 Ohio Cir. Ct. Rep. 438.

[9] Metcalf v. Barker, 187 U. S. 174, 47 L. Ed. 122, 9 Am. B. R. 36.

[10] Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; Taylor v. Taylor, 59 N. J. Eq. 84, 4 Am. B. R. 211; Frazier v. Southern L. & T. Co. (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 3 Am. B. R. 710; Doyle v. Heath, 22 R. I. 213, 4 Am. B. R. 705; Nat'l Bank v. Hobbs, 118 Fed. Rep. 626, 9 Am. B. R. 190; Snyder v. Smith, 185 Mass. 58.

[11] *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35; *In re* Beaver Coal Co., 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206.

[12] Bank of Comm. v. Elliott, 109 Wis. 648, 6 Am. B. R. 409.

[13] Owen v. Brown (C. C. A. 6th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717; Hillyer v. LeRoy, 179 N. Y. 369.

to the four months' period are not affected by an adjudication in bankruptcy. It is equally clear that a judgment to foreclose a valid mortgage given prior to the four months' period would not be invalidated by bankruptcy of the mortgagor,[14] although the judgment was obtained within the four months' period, because these liens are not created, but are merely enforced, by the legal proceedings.

The effect of a legal proceeding to create a lien and the time at which it attaches is determined by the local law as construed by the highest court of the state where such proceeding is had.[15]

Liens created by statute which may be enforced by legal proceedings are not affected by Sec. 67*f* of the bankrupt act. A mechanic's lien for labor or materials [16] or a livery keeper's lien [17] is not dissolved although legal proceedings are taken within the four months' period to enforce the same.

§ 192b. Second: The lien must be created within four months.

Whether a judicial lien may be annulled or dissolved by bankruptcy proceedings depends upon the time when it was created.

Sec. 67*f* of the bankrupt act applies only to such liens as are created within four months prior to the filing of the petition in bankruptcy.[1] Liens obtained by judgment, levy, attachment

[14] Reed v. Equitable Trust Co., 115 Ga. 780, 8 Am. B. R. 242.

[15] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Johnson, 108 Fed. Rep. 373, 6 Am. B. R. 202; *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574; London Guaranty & Accident Co. v. Mossness, 108 Ill. App. 440.

[16] *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B. R. 126; Fehling v. Goings, 67 N. J. Ch. 375, 58 Atl. Rep. 642, 13 Am. B. R. 154.

[17] *In re* Pratesi, 126 Fed. Rep. 588, 11 Am. B. R. 319; *In re* Mero, 128 Fed. Rep. 630, 12 Am. B. R. 171.

[1] In Metcalf v. Barker, 187 U. S. 174, 47 L. Ed. 122, 9 Am. B. R. 36, the supreme court say: "It is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the fil-

or otherwise within that period may be dissolved or avoided.[2] Those which are obtained prior to four months before the petition in bankruptcy is filed are valid and enforceable and are so recognized by the courts of bankruptcy.[3]

This section of the bankrupt act does not apply to judgments, levies or attachments obtained after the petition is filed.[4] The reason for this is that it is not within the four months' period specified in the act and also that no lien can be created upon the property of the bankrupt by such proceedings after the petition is filed.[5] Such property passes to the trustee unaffected by the legal proceedings.

The time a lien attaches depends upon the state law.[6] The

ing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise."

As to computing time, see Jones v. Stevens, 94 Me. 582, 5 Am. B. R. 571.

[2] Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *In re* Kenney, 105 Fed. Rep. 897, 5 Am. B. R. 355; *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; *In re* Richards (C. C. A. 7th Cir.), 96 Fed Rep. 935, 3 Am. B. R. 145; *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574; *In re* Hymes Buggy & Implement Co., 130 Fed. Rep. 977, 12 Am. B. R. 477; *In re* Haynes, 123 Fed. Rep. 1001, 10 Am. B. R. 715; *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285.

[3] Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; Owen v. Brown (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 9 Am. B. R. 717; Snyder v. Smith, 185 Mass. 58; *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35; Tucker v. Denico, 26 R. I. 560; Hillyer v. LeRoy, 179 N. Y. 369; Camp v. Young, 119 Ga. 981.

[4] *In re* Engle, 105 Fed. Rep. 893, 5 Am. B. R. 372; Kinmouth v. Braeutigam, 63 N. J. Eq. 103, 10 Am. B. R. 83; Kinmouth v. Braeutigam, 4 Am. B. R. 344; St. Cyr v. Daignault, 103 Fed. Rep. 854, 4 Am. B. R. 638; *In re* Duble, 117 Fed. Rep. 794, 9 Am. B. R. 121; State Bank v. Cox (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 16 Am. B. R. 32.

[5] See cases cited in last note above.

[6] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Johnson, 108 Fed. Rep. 373, 6 Am. B. R. 202; *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574; London Guaranty & Accident Co. v. Mossness, 108 Ill. App. 440.

general rule is that a lien is created whenever by the law and the usage of the state the charge created by process of law becomes fixed, fastened to the property itself, so as to make it specifically liable for the debt. In various states the property becomes so charged at different stages in the proceedings, as by the rendition of judgment, by the delivery of the execution to the sheriff, by the commencement of the levy or it may relate back to the beginning of the suit or the first day of the term at which the judgment was rendered.[7]

A lien created by a judgment and levy of execution within four months of the filing of a petition in bankruptcy is null and void where the officer has not paid the money collected on the execution to the judgment creditor.[8] It has been intimated by the supreme court[9] and held by other courts[10] that where the money has been collected upon an execution

[7] *In re* Mencke v. Rosenberg, 202 Penn. St. Rep. 131, 9 Am. B. R. 323, it was held that a *testatum fi fa* issued within four months on a judgment entered prior to that time was avoided by Sec. 67*f*. *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703, it was held that a lien of execution could not be relating back to the beginning of the suit antedate the date of acquiring the property seized. In Waller v. Best, 3 How. 111, a lien was held to attach under the laws of Kentucky upon the delivery of the writ to the sheriff.

Voyles v. Parker, 4 Fed. Rep. 210, 9 Biss. 326, where the lien was held to relate back to the beginning of a suit under a local statute.

In Reed v. McIntyre, 98 U. S. 507, 25 L. Ed. 171, it was held that a levy on the property of a bankrupt after it had been conveyed to an assignee for the benefit of creditors did not constitute a valid lien, because the title to the property had passed out of the bankrupt before the levy.

[8] Clarke v. Larremore, trustee, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; affirming *In re* Kenney, 105 Fed. Rep. 897, 5 Am. B. R. 355; *In re* Benedict (Sup. Ct. N. Y.), 8 Am. B. R. 463.

In re Breslauer, 121 Fed. Rep. 910, 10 Am. B. R. 33, it was held recoverable by trustee where sheriff had notice of bankruptcy before payment to creditor.

[9] Clarke v. Larremore, trustee, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

[10] Botts v. Hammond (C. C. A. 4th Cir.), 99 Fed. Rep. 916, 3 Am. B. R. 775; Levor v. Seiter (Sup. Ct. App. Div. N. Y.), 8 Am. B. R. 459, Peck v. Connell (Com. Pleas Pa.), 6 Am. B. R. 93; Davis v. Jewetts Bros., 17 S. D. 410; *In re* Bailey, 144 Fed. Rep. 214, 16 Am. B. R. 289; *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220.

issued upon a judgment obtained against the bankrupt within the four months' period and paid to the judgment creditor before the filing of the petition in bankruptcy that it does not fall within the prohibition of Sec. *67f*. The reason for this distinction is that Sec. 67 refers to existing liens and does not cover cases where a lien has been merged in judgment, execution and sale and the money distributed. The lien is thereby extinguished. It would seem that property so paid to a judgment creditor might be recovered in a proper case under Sec. *60b*, as a preference created by a judgment. The bankruptcy court may intervene to stay the process at the instance of the creditors who had or were about to institute bankruptcy proceedings. This has frequently been done.[11]

A lien created by a judgment obtained within the four months' period on a note which gave the holder a power of attorney to enter up judgment against the debtor in case of nonpayment at maturity is void, although the note was given prior to that period.[12] The reason is that the lien is created by the judgment and not by giving the note.

An execution levied within four months of bankruptcy upon a judgment obtained prior to that period is annulled by Sec. *67f*,[13] but not where the judgment so obtained created a lien on the property of the debtor.[14] A fund discovered by proceedings in aid of execution should be paid to the trustee and not to the judgment creditors.[15]

The seizure of property by a vendor to subject it to the payment of the purchase money falls within the prohibition of the statute.[16] Sec. *67f* also covers a seizure of property on a writ of replevin within four months of bankruptcy.[17]

[11] Clarke v. Larremore, trustee, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; Peck v. Connell (Com. P.eas Pa.), 6 Am. B. R. 93.

[12] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; Rothermel v. Moyer, 24 Pa. Super. Ct. R. 325; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142.

[13] *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 8 Am. B. R. 703; Mencke v. Rosenberg, 202 Penn. St. Rep. 131, 9 Am. B. R. 323.

[14] Hillyer v. LeRoy, 179 N. Y. 369.

[15] Rodgers & Son v. Forbes & Schoen, 23 Ohio Cir. Ct. Rep. 438.

[16] *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574.

[17] *In re* Hymes Buggy & Imple-

An attachment in a suit to collect a simple contract debt begun within four months before the filing of a petition in bankruptcy is invalidated by an adjudication.[18] Where the attachment lien existed prior to the four months' period a judgment within that period enforcing the lien is valid.[19] The same rule has been recognized by the courts with reference to garnishment proceedings.[20]

When a judgment is rendered null and void because obtained within the four months' period, such nullity and invalidity relate back to the time of the entry of the judgment and affects that and all subsequent proceedings.[21] The property affected by such lien is wholly discharged and released therefrom. If the property has been sold to a *bona fide* purchaser the fund received from such sale takes the place of the property and passes to the trustee.[22]

§ 192c. Third: The debtor must be insolvent.

It is essential to bring a case within the prohibition that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear the lien is valid.[1] It is not sufficient that the levy caused insolvency.[2]

ment Co., 130 Fed. Rep. 977, 12 Am. B. R. 477; *In re* Haynes, 123 Fed. Rep. 1001, 10 Am. B. R. 715.

[18] *In re* Tune, 8 Am. B. R. 285, 115 Fed. Rep. 906; *In re* Moore, 6 Am. B. R. 175, 107 Fed. Rep. 234; Thompson v. Ragan, 25 Ky. Law Rep. 1684.

[19] *In re* Beaver Coal Co., 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35.

[20] Garnishment held valid in Bank of Commerce v. Elliott, 109 Wis. 648, 6 Am. B. R. 409; *In re* Swift, 111 Fed. Rep. 503, 7 Am. B. R. 117. Garnishment held invalid *In re* McCartney, 109 Fed. Rep. 629, 9 Am. B. R. 367; *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639.

[21] Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; *In re* Beals, 8 Am. B. R. 639, 116 Fed. Rep. 530.

[22] Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

[1] Simpson v. Van Etten, 108 Fed. Rep. 199, 6 Am. B. R. 204.

[2] Chicago Title & Trust Co. v. Roebling, 107 Fed. Rep. 71, 5 Am. B. R. 368.

§ 192d. Preserving liens under Sec. 67f for general creditors.

Judicial liens are not necessarily held null and void. The court may preserve them, if to destroy the lien would militate against the best interests of the estate. A familiar example is where there are subordinate valid liens which would take precedence if the judicial lien be null and void.[1] It is possible that if the lien be avoided the whole property to which the lien attached might be exhausted by claims, which should justly be paid after the judicial lien.

In such cases the court may, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate.[2] In other words, the trustee is subrogated to the rights of a particular creditor for the benefit of all the creditors. Substantially the same provision is made with reference to liens created by judicial proceedings begun within four months of bankruptcy proceedings.[3] The court is authorized to order such conveyance as may be necessary to carry the purpose of this section into effect. But nothing contained in this provision has the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who has acquired the same without notice or reasonable cause for inquiry.[4]

§ 193. Dissolution of liens.

The act provides[1] that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, includ-

[1] First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[2] B. A. 1898, Sec. 67*f*. *In re* Moore, 107 Fed. Rep. 234, 6 Am. B. R. 175; First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639, affirming (C. C. A. 4th Cir.), 133 Fed. Rep. 717, 13 Am. B. R. 281; affirming *In re* Baird, 126 Fed. Rep. 845, 11 Am. B. R. 435; *In re* Merrow, 131 Fed. Rep. 993, 12 Am. B. R. 615; Receivers, etc., v. Staake (C. C. A. 4th Cir.), 133 Fed. Rep. 717, 13 Am. B. R. 281.

[3] B. A .1898, Sec. 67*c*.

[4] B. A. Sec. 67*f*. As to purchaser with notice, see Brown v. Case, 185 Mass. 45, 6 Am. B. R. 744.

ing an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if, *first,* it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference;[2] or, *second,* the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in

[1] B. A. 1898, Sec. 67*c*. *In re* Dougherty, 109 Fed. Rep. 480, 6 Am. B. R. 457.

[2] Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Watson v. Taylor, 21 Wall. 378, 22 L. Ed. 576; Little v. Alexander, 21 Wall. 500, 22 L. Ed. 625; National Bank v. Warren, 96 U. S. 539, 24 L. Ed. 640; Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164; Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; *In re* Kerr, No. 7728 Fed. Cas., 2 N. B. R. 388; *In re* Campbell, No. 2349 Fed. Cas., 1 Abb. U. S. 185; *In re* Schnepf, No. 12471 Fed. Cas., 2 Ben. 72.

As to judgment notes and judgment by confession, see Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Watson v. Taylor, 21 Wall. 378, 22 L. Ed. 576; Haughey v. Albin, No. 6222 Fed. Cas., 2 Bond, 244; Mays v. Fritton, 20 Wall. 414, 22 L. Ed. 389; Street v. Dawson, No. 13533 Fed. Cas., 4 N. B. R. 207; Balfour v. Wheeler, 18 Fed. Rep. 893; *In re* Baxter, 25 Fed. Rep. 703.

[3] As to what constitutes a reasonable cause to believe the defendant was insolvent, etc., see Buchanan v. Smith, 16 Wall, 277, 21 L. Ed. 280; Grant v. First National Bank, 97 U. S. 80, 24 L. Ed. 971; Merchants National Bank v. Cook, 95 U. S. 342, 24 L. Ed. 412; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Stuckey v. Masonic Savings Bank, 108 U. S. 74, 27 L. Ed. 640; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Foster v. Hackley, No. 4971 Fed. Cas., 2 N. B. R. 406; *In re* Wright, No. 18071 Fed. Cas., 2 N. B. R. 490; Scammon v. Cole, No. 12432 Fed. Cas., 3 Clif. 472; Peckham v. Burrows, No. 10897 Fed. Cas., 3 Story, 544; Burpee v. National Bank, No. 2185 Fed. Cas., 5 Biss. 405; Forbes v. Howe, 102 Mass. 427; Otis v. Hadley, 112 Mass. 100; Graham v. Stark, No. 5676 Fed. Cas., 3 Ben. 520; Castle v. Lee, No. 2506 Fed. Cas., 11 B. R. 80; Haskell v. Ingalls, No. 6193 Fed. Cas., 1 Hask. 341; *In re* Walton, No. 17128 Fed. Cas., Deady, 442.

As to the meaning of the words "in contemplation of bankruptcy," see Buckingham v. McLean, 13 How. 167, 14 L. Ed. 91; *In re* Craft, No. 3316 Fed. Cas., 2 Ben. 214, affirmed in No. 3317 Fed. Cas., 6 Blatch. 177; Ashby v. Steere, No.

contemplation of bankruptcy;[3] or, *third,* that such lien was sought and permitted in fraud of the provisions of the act. The act of congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any judicial lien, obtained with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a lien sought and permitted in fraud of the provisions of this act.[4]

It has been held that this provision was destroyed by the subsequent introduction of Sec. 67*f* into the bill before enactment.[5] It, however, stands as a part of the bankruptcy law of this country and a case falling within the terms and not controlled by 67*f* will undoubtedly be sustained according to its terms.

§ 194. Preferences by transfers.

Under the bankrupt act a preference may be created by transferring property to or for the benefit of a creditor as well as by a judicial lien.[1] The word "transfer," as used in the bankrupt act, includes the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift or security.[2] Before considering

576 Fed. Cas., 2 Woodb. & M. 347; Robson's Bankruptcy, 166.

To the effect that actual bankruptcy must be contemplated by the debtor at the time of the transaction, see Morgan v. Brundrett, 5 B. & Ad. 296; Atkinson v. Brindall, 2 Bing. N. C. 225; Abbott v. Burbage, 2 Scott, 656; Strachan v. Barton, 1 1Ex. 647.

To the effect that the circumstances and not the actual intent of the debtor at the time of the transaction are such as to make his bankruptcy a probable or inevitable event, is a sufficient contemplation of bankruptcy, see Gibson v. Boutts, 4 M. & G. 169; Gibson v. Muskett, 4 M. & G. 160; Poland v. Glyn, 12 J. B. Moore, 109; *Ex parte* Simpson, De eGx. 9; Alfred v. Constable, 4 Ad. and El. N. S. 674.

[4] See observation of Mr. Justice Field, with reference to transfers, in Toof v. Martin, 13 Wall. 40, 51, 20 L. Ed. 481.

[5] *In re* Tune, 8 Am. B. R. 285, 115 Fed. Rep. 906.

[1] B .A. 1898, Sec. 60, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[2] B. A. 1898, Sec. 1, clause 25.

In Stern, Falk & Co. v. Louisville Trust Co. ,112 Fed. Rep. 501, 7 Am. B. R. 305, the circuit court

these different methods of transferring property separately, it may be profitable to notice the incidents relating to transfers generally.

It should be observed that Sec. 60*a* defines what constitutes a preference, and par. *b* of the same section prescribes the conditions under which such preference may be set aside. By the amendment of 1903 the four months' limitation was taken from clause *b* and inserted in clause *a*. Under the bankruptcy act as it exists the only interest a practitioner has in a preference is to determine whether it is a voidable preference or not. This is necessary in deciding whether the preferred property transferred can be recovered in a suit by the trustee or whether the creditor must surrender his preference under Sec. 57*g* before the allowance of his claim. In either of these cases it must be a voidable preference since the amendment of 1903. What constitutes a preference so as to be an act of bankruptcy is considered in Chapter VIII.

In order that a transfer shall constitute a preference, which may be avoided, whatever the manner of transferring it may be, four elements are necessary.[3] *First*, the transfer must be

of appeals for the sixth circuit, said:

"The controlling question of law in the cases is whether these facts constitute a preference within the meaning of that term in the bankruptcy act. The word is not in set terms defined by the act, but we have no doubt that so far as the nature of the property transferred is concerned it includes everything which has capacity for being taken and appropriated to the satisfaction of debts provable under the act. It may be of a legal or of an equitable nature.

"In respect to the means by which the transfer is effected there is no limitation. However devious the method, if the result is that, but for the act, the creditor acquires property from the debtor which is subject at law or in equity to be appropriated to the satisfaction of the debtor's obligations, that is a transfer within the meaning of the law."

See also Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773.

A transfer does not embrace a fictitious transaction where no value was intended to pass and where none was actually transferred. *In re* Steam Vehicle Co., 121 Fed. Rep. 939, 10 Am. B. R. 385.

[3] Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re* Dundas, 111 Fed. Rep. 500, 7 Am. B. R. 129.

made from an insolvent person to a creditor. *Second,* the effect of such transfer must be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Third,* the person receiving it or to be benefited thereby, or his agent acting therein, must have had reasonable cause to believe that it was intended thereby to give a preference. *Fourth,* the transfer must have been made within four months before filing a petition in bankruptcy, or after filing the petition and before adjudication.

If any one of these elements is wanting, the preference can not be set aside, if otherwise valid under the state law.[4] Thus if it were made more than four months prior to the filing of the petition, or by a solvent person, or did not in fact prefer a creditor by giving him a larger percentage than other creditors, or if the person receiving it had no cause whatever to believe that he was obtaining a preference over other creditors, it can not be recovered by the trustee.

It is immaterial under the bankrupt act whether the preference is given voluntarily or at the urgent solicitation or threat of a creditor.[5]

Although the bankrupt law does not operate beyond the limits of the United States, a preference given to a foreigner is in violation of its provision to the same extent and under the same conditions that it would be if the preference had been given to a resident of the United States.[6] It makes no difference in this proposition that the contract of purchase was made abroad, and to be performed abroad when the goods had

[4] Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198; Anibal v. Heacock, 2 Fed. Rep. 169; Rice v. Grafton Mills, 117 Mass. 228; Paddock v. Fish, 10 Fed. Rep. 125; Alexander v. Galt, 9 Fed. Rep. 149; Warren v. Moody, 122 U. S. 132, 30 L. Ed. 1128.

In re Henry C. King Co., 113 Fed. Rep. 110, 7 Am. B. R. 619, Judge Lowell said: "I must hold, therefore, that knowledge of insolvency did not make a preference of acts which otherwise did not amount to a preference."

[5] Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542; Wilson v. Brinkman, No. 17794 Fed. Cas., 2 N. B. R. 468; Rison v. Knapp, No. 11861 Fed. Cas., 1 Dill. 187; Graham v. Stark, No. 5676 Fed. Cas., 3 N. B. R. 357; Foster v. Hackley, No. 4971 Fed. Cas., 2 N. B. R. 406.

been delivered to the bankrupt, and they were his property, and in the United States.[6]

§ 194a. First: The transfer must be made by an insolvent person to his creditor.

An essential element of a preferential transfer voidable under Section 60*a* is that the transfer be made by an insolvent person to or for the benefit of his creditor.

A transfer by a person other than the bankrupt to the creditor does not constitute a preference,[1] as where the wife of a bankrupt pays his debts from her separate estate,[2] or where the directors of a corporation individually pay a debt of the corporation,[3] or where money is advanced to the bankrupt by a third person for a specific purpose and is not used for that purpose but returned to him.[4] Where the transfer is made by the agent of the bankrupt to a creditor it constitutes a preference, as where a clearing house in making settlements with its members pays money due the bankrupt bank to its creditors.[5] Such credit should be paid to the trustee of the bankrupt bank.

A transfer to a person other than a creditor unless for his benefit [6] is not a preference within this section.[7] A customer is not a creditor of a stockbroker.[8] A creditor will not be permitted to obtain a preference indirectly by transfer of his

[6] Olcott v. McLean, 50 How. Prac. 455.

[1] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541; Goode v. Elwood Lodge, 160 Ind. 251; Keegan v. Hamilton Nat. Bank, 163 Ind. 216; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

[2] Goode v. Elwood Lodge, 160 Ind. 251.

[3] Keegan v. Hamilton Nat. Bank, 163 Ind. 216.

[4] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[5] Rector v. City Deposit Bank, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336; Rector v. Commercial Nat. Bank, 200 U. S. 420, 50 L. Ed. 533, 15 Am. B. R. 347.

[6] *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345.

[7] Richardson v. Shaw (C. C. A. 2d Cir.), 147 Fed. Rep. 659; Lyon v. Clark, 129 Mich. 381; North v. Taylor, 70 N. Y. Supp. 339, 6 Am. B. R. 233.

[8] Richardson v. Shaw (C. C. A. 2d Cir.), 147 Fed. Rep. 659.

account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankrupt act.[9] An endorser or surety is a creditor, who may receive a preference from his principal.[10] Such transfers may be recovered in a proper case under Sec. 67*e* and Sec. 70*e*.

A transfer of all his property by a debtor to a corporation, owned by a committee of creditors selected at a general meeting of his creditors for this purpose, can not be set aside at the suit of a nonparticipating creditor, in the absence of a fraudulent design.[11]

A transfer or conveyance of property by a solvent debtor to his creditor is not a preference voidable under Section 60. A person may dispose of his property by gift or sale so long as he has enough to pay his just debts.[12] In order to set aside a conveyance or transfer of property it must be alleged and proved to have been made by a person insolvent at the time.[13]

The act of 1867 did not define what constituted insolvency. It was defined by the courts to mean that a debtor could not pay his debts in the ordinary course of business as men in trade usually do, and such was the conclusion, even though his inability was not so great as to compel him to stop business.[14]

[9] *In re* Beerman, 112 Fed. Rep. 663, 7 Am. B. R. 431; *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345.

[10] Crandall v. Coats, 133 Fed. Rep. 965, 13 Am. B. R. 712; Swarts v. Siegal (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689.

[11] *In re* Robertshaw Mfg. Co., 133 Fed. Rep. 556, 13 Am. B. R. 409.

[12] Warren v. Moody, 122 U. S. 132, 30 L. Ed. 1128; Adams v. Collier, 122 U. S. 382, 30 L. Ed. 1207; Savage v. Savage (C. C. A. 4th Cir.), 141 Fed. Rep. 346, 15 Am. B. R. 599.

[13] *In re* Alexander, 102 Fed. Rep. 464, 4 Am. B. R. 376; *In re* Wittenberg Veneer & Panel Co., 108 Fed. Rep. 593, 6 Am. B. R. 271; Martin v. Bigelow (Supr. Ct. N. Y.), 36 Misc. Rep. 298, 7 Am. B. R. 218; Kimball v. Dresser, 98 Me. 519; *In re* Mandel, 127 Fed. Rep. 863, 10 Am. B. R. 774; Empire Trust Co. v. Fisher, 67 N. J. Eq. 88, 57 Atl. Rep. 502; Schilling v. Curran, 30 Mont. 370, 76 Pac. Rep. 998; Swartz v. Frank, 183 Mo. 438; Townes v. Alexander, 69 S. C. 23.

[14] Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198.

But in the present act "insolvency" is not used in the same sense as it was used in the prior acts. It is defined by the statute itself: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to hinder or delay his creditors shall not at a fair valuation be sufficient in amount to pay his debts."[15] It thus appears that a person might not be able to pay his debts as they become due in the ordinary course of business, and yet be perfectly solvent. The test under the present act is whether or not the debtor's property, at a fair valuation, equals his liabilities.

The question of insolvency is one of fact.[16] It should be submitted to a jury under proper instructions when the case is tried to a jury. The burden of establishing insolvency at the time the preference was given is on the person alleging it.[17]

The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition.[18] But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication.[19] The books of a bankrupt, the schedule and inventory and appraisement are

In Scammon v. Cole, No. 12433 Fed. Cas., 1 Hask. 214, Judge Fox says: "This definition has been substantially adopted by every district judge in the country before whom the question has arisen."

[15] B. A. 1898, Sec. 1, clause 15; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Butler Paper Co. v. Goembel (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 16 Am. B. R. 26.

For a discussion of when a debtor is insolvent, see Sec. 50*a*, *ante*.

[16] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862.

[17] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608; Edwards v. Milling Co., 108 Mo. App. 275; Halbert v. Pranke, 91 Minn., 204; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; Kimball v. Dresser, 98 Me. 519.

[18] *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608; Kimball v. Dresser, 98 Me. 519; Edwards Milling Co., 108 Mo. App. 275.

[19] DeGraff v. Lang, 87 N. Y. Supp. 78, 92 App. Div. N. Y. Supr. Ct. 564.

evidence on the question of insolvency within four months of the date of the filing of the petition, but are not conclusive.[20] Where the quantity and value of the bankrupt's assets were not materially diminished from the time of the transfer until the commencement of the proceedings in bankruptcy, the court or jury may find that the debtor was insolvent when he made the transfer.[21]

§ 194b. Second: The effect must be to enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class.

The main object of the bankrupt law is to provide for the equal distribution of the property of a debtor among his creditors. Sec. 60*a* makes every transfer of any of the insolvent's property, by means of which a greater percentage would be paid out of his estate to any creditor, or on any claim, than every other creditor and every other claim of the same class would receive a preference to be avoided or surrendered under other provisions of the statute. "The test of a preference, under the act, is the payment, out of the bankrupt's property, of a greater percentage of the creditor's claim than other creditors of the same class receive." [1] It does not depend upon the purpose or intent of the debtor or the creditor.[2] It is merely the effect or result of the transaction. Payments and sales in the usual course of business where the new sales succeed payments and net result is to increase the bankrupt's estate

[20] *In re* Docker-Fisher Co., 123 Fed. Rep. 190, 10 Am. B. R. 584; *In re* Mandel, 127 Fed. Rep. 863, 10 Am. B. R. 774; Bank of N. Y. v. Southern Nat. Bank, 170 N. Y. 1; Hackney v. Hargreaves Bros., 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213.

[21] Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[1] Swarts v. Fourth National Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673.

[2] Pirie v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171; Engel v. Union Square Bank (N. Y. Sup. Ct. Div.), 87 N. Y. Supp. 1070; Hackney v. Hargreaves, 68 Neb. 624, 13 Am. B. R. 164, reversing 10 Am. B. R. 213, 5 Am. B. R. 814; *In re* Fixen, 102 Fed. Rep. 295, 4 Am. B. R. 10; *In re* Conhaim, 97 Fed. Rep. 923, 3 Am. B. R. 249; Crooks v. People's Nat. Bank (N. Y. Sup. Ct.), 3 Am. B. R. 238.

do not constitute preferential transfers.[3] A part payment to a creditor is not a preference, when by the receipt of the amount he did not get a larger percentage of his debt than the debtor is able to pay his other creditors at that time.[4]

Where creditors are entitled to the same percentage on their debts they are in the same class as unsecured creditors having provable claims. This is true even though some of them are secured by endorsement or guaranty and the others are not.[5] Labor claimants, entitled to priority, constitute a separate class from the unsecured creditors.[6] Other classes may be composed of creditors having a valid mortgage, lien or other securities or entitled to priorities in the distribution of the estate. These secured classes become material in actual practice when there are not sufficient funds to pay the whole of any one class, as where the assets are insufficient to pay all the labor claims. In such case they must be paid *pro rata* or a preference is created.

The giving of a leasehold in order that the grantee may get an advantage over other creditors is a preference.[7]

In order to entitle a trustee to recover a preference he must allege and prove, among other things, that there is a consequent inequality between creditors of the same class.[8]

§ 194c. Third: Reasonable cause to believe, etc.

Under the act of 1867 the person receiving the transfer must at the time have had reasonable cause to believe the

[3] Jacquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; *In re* Sagor (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenhan Co. (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

[4] Brittain Dry Goods Co v. Bertenshaw, 68 Kan. 734.

[5] Swarts v. Fourth Nat. Bank, 117 Fed. Rep. 1, 8 Am. B. R. 673; Swarts v. Siegel, 114 Fed. Rep. 1001 (on app. to C. C. A.), 8 Am. B. R. 689, 117 Fed. Rep. 13.

But see *In re* Harpke, 116 Fed. Rep. 295, 8 Am. B. R. 535.

[6] *In re* Read & Knight, 7 Am. B. R. 111.

[7] Carter v. Hobbs, 94 Fed. Rep. 108, 2 Am. B. R. 224.

[8] Kimball v. Dresser, 98 Me. 519.

person making the transfer was insolvent.[1] Under the present act the creditor to be benefited must have reasonable cause to believe that a preference was intended to be given.[2] This phrase includes reasonable cause to believe that the debtor is insolvent, for this is one of the elements of a preference.[3] It also includes a reasonable cause to believe that he is to obtain a greater percentage of his debts than any other creditor in his class, for this is another element of a preference. The intent of the debtor is immaterial.[4] The result of his action only is considered in determining whether he has given a preference.

It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained.[5] It has been held that the mere

[1] R. S. Sec. 5128; Toof v. Martin, 13 Wall. 40, 20 L. Ed. 281; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504.

[2] B. A. 1898, Sec. 60*b*; Jacobs v. Van Sickle, 123 Fed. Rep. 340, 10 Am. B. R. 519; Tait v. National Bank, 8 Ohio N. P. Rep. 59, 2 N. B. N. 1145; Hicks v. Langhorst (Hamilton County, O., Common Pleas), 3 N. B. N. 528, 6 Am. B. R. 178; *In re* Jacobs, 1 Am. B. R. 518; Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; Levor v. Seiter (N. Y. Sup. Ct. App. Div.), 8 Am. B. R. 459; *In re* Dundas, 7 Am. B. R. 129, 111 Fed. Rep. 500.

[3] Thomas v. Adelman, 136 Fed. Rep. 973, 14 Am. B. R. 510; Blankenbaker v. Charleston State Bank, 111 Ill. App. 393; Des Moines Savings Bank v. Morgan Jewelry Co., 123 Ia. 432.

[4] Benedict v. The Union Cloak and Suit Co., 177 N. Y. 1, 11 Am. B. R. 20.

[5] Crittenden v. Barton (N. Y. Sup. Ct. App. Div.), 5 Am. B. R.

knowledge that a debtor was behind in his payments is not sufficient of itself to put his creditors upon inquiry and charge him with notice of facts which inquiry might disclose,[6] nor the mere fact of taking security for a loan.[7]

Mr. Justice Bradley, speaking for the supreme court in a leading case on this subject, laid down the rule with reference to what constituted a reasonable cause to believe a debtor to be insolvent under the former statutes in the following words:[8] "Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' *Dicta* are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure.[9] It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and

775; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Hackney v. Hargreaves, 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213.

[6] *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449.

[7] Stedman v. Bank, 117 Fed. Rep. 237, 9 Am. B. R. 4.

[8] Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971. This is referred to in Stuckey v. Savings Bank, 108 U. S. 74, 27 L. Ed. 640, as "a case which was fully considered, and which has since been followed by us as a leading case on the subject."

[9] *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Lyon v. Clark, 129 Mich. 381; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 8 Am. B. R. 45; Gretchel v. First Nat. Bank, 66 N. J. Eq. 88.

yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through his difficulties long after his case is in fact desperate; and his creditors, if they know nothing of his embarrassments, either participate in the same feeling or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of the ordinary intelligent man." The definition given by the supreme court to the phrase used in the act of 1867 has been applied in construing language used in the present bankrupt act.[10]

[10] As was done *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Lyon v. Clark, 129 Mich. 381; Bardes v. First Nat. Bank, 122 Ia. 443, 12 Am. B. R. 771; *In re* Virginia Hardwood Mfg. Co., 130 Fed. Rep. 209, 15 Am. B. R. 135; Stevenson v. Milliken Milling Co., 99 Me. 320, 13 Am. B. R. 201; *In re* Goodhile, 130 Fed. Rep. 471, 12 Am. B. R. 374; Off v. Hakes (C. C. A. 7th Cir.), 142 Fed. Rep. 364, 15 Am. B. R. 696; Butler Paper Co. v. Goembel (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 16 Am. B. R. 26.

Whether a creditor has reasonable cause to believe, etc., may be determined from the conduct of the parties and the nature of the transaction.[11] This is often the only means of proof. A person is always presumed to intend what is the necessary and unavoidable consequences of his act.[12] Whether or not the facts and circumstances in the possession of the creditor at the time the alleged preference was made were sufficient to cause an ordinary prudent business man to conclude that a preference was intended is a question for the jury and not for the court in a jury trial.[13]

It should be observed that a person receiving a preference is chargeable with the knowledge of his agent, who shall have reasonable cause to believe that it was intended to be a preference. The words of the statute are "agent acting therein." [14] It is therefore necessary in order to charge the creditor with notice, that the agent should have some part in negotiating the transfer which constitutes the preference. It has been held that the knowledge of a clerk of a bankrupt firm of its insolvency is not binding upon a preferred creditor, who subsequently hires the said clerk to take charge of the goods

[11] Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; Hackney v. Raymond Bros., Clarke Co., 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147..

[12] Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447; English v. Ross, 140 Fed. Rep. 630, 15 Am. B. R. 370.

[13] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Wetstein v. Franciscus (C. C. A. 2d Cir.), 133 Fed. Rep. 900, 13 Am. B. R. 326; Sundheim v. Ridge Ave. Bank, 138 Fed. Rep. 951, 15 Am. B. R. 132; Evans v. Nat. Broadway Bank, 88 N. Y. Sup. Ct. App. Div. 549, 85 N. Y. Supp. 101.

[14] B. A. 1898, Sec. 60*b;* Babbitt v. Kelley (St. Louis Court of App.), 9 Am. B. R. 335, 70 S. W. R. 384; *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41; *In re* Gillette, 104 Fed. Rep. 769, 5 Am. B. R. 119; *In re* Nassau, 140 Fed. Rep. 912, 14 Am. B. R. 828; Plummer v. Myers, 137 Fed. Rep. 660, 14 Am. B. R. 805; Beattie v. Gardner, No. 1195 Fed. Cas., 4 Ben. 479; Graham v. Stark, No. 5676 Fed. Cas., 3 Ben. 520; Mayer v. Herman, No. 9344 Fed. Cas., 10 Blatch. 256; Rogers v. Palmer, 102 U. S. 263; Nisbit v. Macon Co., 12 Fed. Rep. 686; Ungewitter v. Von Sachs, No. 14343 Fed. Cas., 4 Ben. 167.

transferred to such creditor as a preference.[15] Where money is collected through a collection agency by an attorney of that agency, who was not employed directly by the creditors, his knowledge was held not chargeable to the creditors in such a sense as to render them liable to the trustee in bankruptcy for the money collected.[16]

It may be collated from the decisions that a person has reasonable cause for inquiry, where a banker allows his drafts to go to protest, suspends payment and closes his doors against depositors and the creditor has knowledge of these facts,[17] or where a merchant stops payment of his commercial paper and the holder is compelled to bring a suit to which no defense is put in,[18] or where a merchant fails to meet his debts as they mature in the ordinary course of business.[19] The existence of a general financial crisis should put a prudent man upon inquiry with reference to doubtful debtors,[20] or rumors which a creditor has heard about his debtor's embarrassment,[21] or any transfer or payment made to a creditor out of the ordinary course of business.[22] Where the sale of a stock of goods to

[15] Whitson v. Farber Bank, 105 Mo. App. 605.

[16] Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

[17] Markson v. Hobson, No. 9099 Fed. Cas., 2 Dill. 327. But if the bank is not the general banker of a bankrupt, the rule does not apply. Rankin v. National Bank, No. 15568 Fed. Cas., 14 N. B. R. 4.

[18] Dunning v. Perkins, No. 4180 Fed. Cas., 2 Biss. 421.

[19] *In re* Forsyth, No. 4048 Fed. Cas., 7 N. B. R. 174; Swan v. Robinson, 5 Fed. Rep. 287; Mayer v. Herman, No. 9344 Fed. Cas., 10 Blatch. 256; Dunning v. Perkins, No. 4180 Fed. Cas., 2 Biss. 421; Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723.

But the mere knowledge that a small claim remains unsettled does not constitue a reasonable cause to believe, etc. Castle v. Lee, No. 2506 Fed. Cas. 11 N. B. R. 80. *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 4 Am. B. R. 449; Lyon v. Clark, 129 Mich. Fed. Cas., 2 Biss. 434; Post v. Corbin, No. 11299 Fed. Cas., 5 N. B. R. 11.

[20] *In re* Clark &. Dougherty, 10 N. B. R. 21.

[21] Golson v. Nichoff, No. 5524 Fed. Cas., 2 Biss 434; Post v. Corbin, No. 11299 Fed. Cas., 5 N. B. R. 11; Hyde v. Corrigan, No. 6968 Fed. Cas., 9 N. B. R. 466.

[22] See R. S. Sec. 5130, which expressly provided that such transfers are *prima facie* void. *In re* Coleman, No. 3021 Fed. Cas., 2 N. B. R. 562; Tuttle v. Truax, No.

pay his debt,[23] or an execution must necessarily stop the debtor's business, it is sufficient to put the creditor upon inquiry,[24] or knowledge of the commission of an act of bankruptcy on the part of the debtor.[25] The plea of ignorance on the part of the creditor will not relieve him of liability when a small amount of inquiry would have given all the necessary information.[26] Nor is an inquiry of a person suspected of fraud, who has every motive for concealing the truth, sufficient, when better and more reliable sources of information are open.[27]

§ 194d. Fourth: Within four months, etc.

In order that a preference be created under the bankruptcy act the transfer must have been within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudication.[1] This clause was transferred from Section 60*b* to Section 60*a* by the amendment of Feb. 5, 1903. By this change the four months' limitation becomes an element of a preference and not merely an element of a voidable preference. Prior to the amendment there was a conflict in the decisions as to whether a transfer prior to the four months' period was a preference. This became material in determining whether the preference must be surrendered under Section 57*g* before a claim could be allowed. It is not material since the amendment because only voidable preferences are required to be surrendered.

14277 Fed. Cas., 1 N. B. R. 601; *In re* Meyer, No. 9515 Fed. Cas., 2 N. B. R. 422; *In re* Beck, No. 1205 Fed. Cas., 1 N. B. R. 588; North v. House, No. 10310 Fed. Cas., 6 N. B. R. 365; *In re* Palmer, No. 10681 Fed. Cas., 3 N. B. R. 283.

[23] Thomas v. Adelman, 136 Fed. Rep. 973, 14 Am. B. R. 510.

[24] Zahm v. Fry, No. 18198 Fed. Cas., 9 N. B. R. 546; Hood v. Karper, No. 6664 Fed. Cas., 5 N. B. R. 358; Smith v. McLean, No. 13074 Fed. Cas., 10 N. B. R. 260; Buchanan v. Smith, 16 Wall. 277, 21 L. Ed. 280.

[25] Warren v. National Bank, No. 17202 Fed. Cas., 10 Blatch. 493, 96 U. S. 539, 24 L. Ed. 640.

[26] *In re* Wright, No. 18071 Fed. Cas., 2 N. B. R. 490.

[27] Singer v. Jacobs, 11 Fed. Rep. 559.

[1] B. A. 1898, Sec. 60, as amended Feb. 5, 1903; 32 Stat. at L. 797. Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R.

The acts mentioned in Section 60 are not such as were forbidden by the common law or generally by the statutes of the states, nor are they acts which in their essential nature are immoral or dishonest. In order to carry out the spirit of the bankrupt system, namely, an equal division of the bankrupt's property among his creditors, congress has adopted a conventional rule to determine the validity of these preferences. It has prescribed a limit of four months. Any transfer made within that time is fraudulent and voidable. It is so not because such preferences are morally objectionable, but simply because the bankrupt act says they are.[2]

Prior to the amendment of February 5, 1903,[3] it was generally held that the four months' period began to run from the date the transfer was made; that is to say, from the date of the delivery of the deed or mortgage and not the date of recording it,[4] unless recording was necessary to create the lien.[5] This was the rule under the act of 1867.[6] But if the mortgagee withholds the mortgage from record for the purpose of allowing the four months to run so as to defeat the provisions of the bankruptcy act relating to preferences, and intending so to do when he took it, it was held that such acts constitute a fraud upon the bankruptcy act and renders the mortgage invalid.[7] Under this construction it was

74; Little v. Holly Brooks Hardware Co. (C. C. A. 5th Cir.), 133 Fed. Rep. 874, 13 Am. B. R. 422; Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; Alexander v. Galt, 9 Fed. Rep. 149.

[2] Bean v. Brookmire, No. 1168 Fed. Cas. s. c. 1 Dill. 25.

[3] 32 Stat. at L. 797.

[4] Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 12 Am. B. R. 74; Rogers v. Page (C. C. A. 6th Cir.), 140 Fed. Rep. 596, 15 Am. B. R. 502; Little v. Holley-Brooks Hardw. Co. (C. C. A. 5th Cir.), 133 Fed. Rep. 874, 13 Am. B. R. 422; *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

[5] First Nat. Bank v. Connett (C. C. A. 8th Cir.), 142 Fed. Rep. 33, 15 Am. B. R. 662; Landis v. McDonald, 88 Mo. App. 335; Babbitt v. Kelly, 9 Am. B. R. 335, 70 S. W. Rep. 384, 96 Mo. App. 529.

[6] Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235.

[7] Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; Clayton v. Exchange Bank (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 10 Am. B. R. 173; Rogers v. Page, 140 Fed.

possible for a transferee to obtain a deed or mortgage more than four months before bankruptcy, which would be valid against the trustee, although the instrument was recorded within the four months. The date of recording the instrument marks the beginning of the four months' period in case of an act of bankruptcy created by a preference.[8] One four months' period of time therefore determined whether a transfer was a preference and an act of bankruptcy, but a different four months' period was the test as to whether the same transfer was a preference and an asset to be recovered by the trustee. To correct the evil of secret liens and to make the same period the test in both instances Section 60*a* was amended by the act of 1903.[9] The amendment provides that "where a preference consists in a transfer, such period of four months shall not expire until after the date of recording or registering of the transfer, if by law such recording or registering is required." [10]

In applying this provision the courts differ as to the meaning of the word "required." [11] As the amendment was introduced in the House it read "required or permitted." In this regard it followed the phraseology of Section 3*b* of the act. The Senate struck out the words "or permitted." [12] It has been held that an instrument may be said to be "required" to be recorded, when recording is necessary to make the transfer or lien valid as against the claims of the creditors represented by the trustee, but if under the laws of the state

Rep. 596, 15 Am. B. R. 502; *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; *In re* Ewald & Brainard, 135 Fed. Rep. 168, 14 Am. B. R. 267.

[8] B. A. 1898, Sec. 3*b*.

[9] 32 Stat. at L. 797; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416; Loeser v. Savings Deposit Bank & Trust Co. (C. C. A. 6th Cir.), 148 Fed. Rep. ——.

[10] B. A. 1898, Sec. 60*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[11] This question is now pending in the supreme court of the United States, in Loeser v. Savings Deposit Bank & Trust Co., on appeal from the U. S. circuit court of appeals for the sixth circuit. The appeal was taken Dec. 3, 1906.

[12] For a history of this amendment, see *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416; Loeser v. Savings Deposit Bank & Trust Co. (C. C. A. 6th Cir.), 148 Fed. Rep. ——.

the transfer or lien is valid as against the claims of such creditors without recording such recording is not required.[13] It is a serious objection to this construction that it does not materially change the rule, which existed prior to the amendment. Some effect should be given to the amendment if the language of the provision will permit.

The better rule is that the word "required" refers to the character of the instrument giving the preference and not as to the persons as between whom it may be valid without recording or the persons as to whom it may be void for failure to record; that is to say, if the instrument falls within the class of instruments subject to record under the laws of the state, it is "required" to be recorded within the meaning of this provision.[14] This construction gives effect to the amendment and makes the same period of time the test as to whether a preferential transfer subject to record is an act of bankruptcy or may be avoided and the property recovered by the trustee. It is true that a mortgagee may have a valid lien under the state law for more than four months by reason of the age of his mortgage and that it may be avoided as a preference because not recorded or because recorded within four months of bankruptcy. It should be borne in mind that all preferences are valid under state laws, as has been pointed out above, and are invalid only because they fall within a class of transfers made within the period of time fixed by the bankrupt act.

Where no recording or registering is required under the state law, this provision does not apply and the general rule prevails; namely, that the four months' period begins to run, in the absence of fraud, from the time the transfer is made.[15]

[13] Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 14 Am. B. R. 477; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416.

[14] Loeser v. Savings Deposit Bank & Trust Co. (C. C. A. 6th Cir.), 148 Fed. Rep. ——, appealed to supreme court Dec. 3, 1906; First Nat. Bank v. Connett (C. C. A. 8th Cir.), 142 Fed. Rep. 33, 15 Am. B. R. 662; English v. Ross, 140 Fed. Rep. 630, 15 Am. B. R. 370.

[15] Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136

It may be observed that Section 60*a* as amended does not contain the provision of Section 3*b* with reference to the four months' period beginning to run, when recording is not required, from the date when possession is taken or notice is otherwise brought home to the creditors of the bankrupt. It has been held that this clause is to be read into Section 60*a*.[16] If possession or notice in some form is necessary to a valid transfer the time would regularly begin to run from the date such possession is taken or notice given. If Congress had intended this clause to be read into Section 60*a* it is fair to presume that it would have been incorporated in it by the amendment.

Where a creditor in pursuance of a valid contract, executed prior to the four months, exercises his right in possessing himself of the bankrupt's property under such contract within four months no preference is created.[17] Where a cred-

Fed. Rep. 396, 14 Am. B. R. 477; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416.

[16] In Long v. Farmers' State Bank (C. C. A. 8th Cir.), 147 Fed. Rep. 360, 365, the court said: "Said provisions of Sections 3 and 60 are to be read together. When so read there can be no permissible question but that the date of the preference referred to in Section 60 is the same as that referred to in Section 3*b*, which, as applied to the facts of this case, is the date when the transferee takes possession of the property, unless the instrument under which the claim is made antedated the four months' period and was recorded prior thereto, if authorized to be recorded under the local statute, or if not so entitled then from the date the beneficiary takes notorious, exclusive possession, unless the creditors of the bankrupt had actual notice of the alleged contract. There is no pretense made in this case of any such disclosure. There was, therefore, no effective transfer of this property under the bankrupt act until June 28, 1904, when the money was turned over by the insolvent to the bank; and this for the palpable reason that that was the first time the bank took any possession of the property or gave any recognizable notice to any creditor of the bankrupt of its asserted title or lien. This we hold is so both upon reason and the weight of authority."

See also English v. Ross, 140 Fed. Rep. 630, 15 Am. B. R. 370.

[17] Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578; *In re* Wolf, 98 Fed. Rep. 74, 3 Am. B. R. 555; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Fisher v. Zollinger, 148 Fed. Rep. ——; Wood v. U. S. Fidelity

itor previously agreed to receive grain in payment of his debt, the transfer dates from the time when the warehouse receipt is mailed to him, but if the creditor had not previously agreed to receive grain in payment of his debt, the transfer dates from the time when the receipt sent by mail is received and accepted by him.[18] In other words, it dated from the time the contract is actually made. An order on a third person for money is not effective as a transfer until it is presented for payment and the four months' period does not begin to run until that time.[19] Where four months have elapsed after the giving of a firm note by a person to pay a separate debt before the bankruptcy of the firm, but less than four months before the bankruptcy of the partner, the transfer is valid.[20] But where the arrangement was made by which property was changed from joint to several after insolvency and within four months of bankruptcy, it was held voidable.[21] It has been held that where an agreement to pledge is made more than four months prior to bankruptcy, but the goods actually pledged within four months, a preference is created.[22] If, however, the agreement is to pledge a particular thing, which is subsequently delivered, the date of the delivery relates back to the time of making the agreement and the four months' period should be computed from the date of the agreement.[23] The same rule applies to agreements to give mortgages.[24]

& Guaranty Co., 143 Fed. Rep. 424, 16 Am. B. R. 21; Union Trust Co. v. Bulkeley (C. C. A. 6th Cir.), 150 Fed. Rep. ——.

[18] Brooks v. Scroggins, 11 N. B. R. 258.

[19] Johnston v. Huff, Andrews & Moyler Co., 133 Fed. Rep. 704, 13 Am. B. R. 287.

[20] *In re* Lane, No. 8044 Fed. Cas., 2 Low. 333. See also Forsaith v. Merritt, No. 4946 Fed. Cas., 1 Low. 336; *In re* Shepard, No. 12754 Fed. Cas., 3 Ben. 347.

[21] *In re* Waite, No. 17044 Fed. Cos., 1 Low. 207; *In re* Federhen, Cas., 1 Low. 207; *In re* Johnson, No. 7369 Fed. Cas., 2 Low. 129.

[22] *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Nisbit v. Macon Bank & T. Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388.

[23] See Wilder v. Watts, 138 Fed. Rep. 427, 15 Am. B. R. 57; Union Trust Co. v. Bulkeley (C. C. A. 6th Cir.), 150 Fed. Rep. ——.

[24] Douglas v. Voegler, 6 Fed. Rep. 52; Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578; Pollock v.

The date from which an unauthorized act of an agent which has been ratified is computed is the date of the act and not of the ratification. This rule is subject to the exception that intervening rights of third persons can not be defeated by the ratification.[25]

In computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.[26] Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[27]

If the transfer is made within four months or before the adjudication it may be avoided and set aside.[28] If it has been made prior to that time it is a valid preference, and the creditor secured thereby will be protected under the bankrupt act.[29] But where a transfer is made by the debtor after an adjudication, and before a trustee is appointed, it is not a prefer-

Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B. R. 616; *In re* Dismal Swamp Const. Co., 135 Fed. Rep. 415, 14 Am. B. R. 175.

[25] Cook v. Tulis, 18 Wall. 338, 21 L. Ed. 933; *In re* Kansas Manufacturing Co., No. 7610 Fed. Cas., 9 N. B. R. 76; Strain v. Gourdin, No. 13521 Fed Cas., 2 Woods, 380.

[26] B. A. 1898, Sec. 31; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re* Lang, No. 8056 Fed. Cas., 2 N. B. R. 480; Jones v. Stevens, 94 Me. 582, 5 Am. B. R. 571; Whitley Grocery Co. v. Roach, 115 Ga. 918.

[27] B. A. 1898, Sec. 1, clause 14.

[28] Blennerhassett v. Sherman, 105 U. S. 100, 26 L. E. D. 1080; Auffm'ordt v. Rasin, 102 U. S. 620, 26 L. Ed. 262; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130; *In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re* Woodward, 95 Fed. Rep. 260, 2 Am. B. R. 239; Sebring v. Wellington (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re* McLam, 3 Am. B. R. 245, 97 Fed. Rep. 922.

[29] Bank v. Sherman, 101 U. S. 404, 25 L. Ed. 866; *In re* Randall, No. 11552 Fed. Cas., 1 Saw. 56; Taylor v. Robertson, 21 Fed. Rep 209; *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; *In re* Wright, 96 Fed. Rep. 187, 2 Am. B. R. 364.

once,[30] but simply an unlawful intermeddling. Such a transfer is at least voidable.

§ 195. Payments.

A payment of money within four months of bankruptcy by an insolvent to apply on a debt past due is a preferential transfer of property, irrespective of the intent of the parties, where it has the effect of enabling a creditor to obtain a greater percentage of his debt than other creditors of the same class.[1] Such a preferential payment may be recovered or required to be surrendered before claim is allowed in cases where the person receiving it or to be benefited thereby, or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference,[2] but not otherwise.[3]

It has been held to be a preference to pay a note or check, even where there is an endorsement by a solvent party.[4] If the surety pays the debt of his principal he takes it subject to the disqualifications and limitations of the principal debtor, and if the principal creditor had received preferential payments it is as if the endorser had received such preferential payments.[5] It should be observed that it is the payment on a

[30] Ryttenberg v. Schefer, 131 Fed. Rep. 313, 11 Am. B. R. 652.

[1] B. A. 1898 Sec. 60*a*, as amended Feb. 5, 1903; Pirie v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814.

[2] *In re* Goodhile, 130 Fed. Rep. 471, 12 Am. B. R. 374. For a discussion of the elements of a voidable preference, see Sec. 194, *et seq.*

[3] Sherman v. Luckhardt, 96 Mo. App. 320, 9 Am. B. R. 307.

[4] Swarts v. 4th Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 8 Am. B. R. 673; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25, affirming 114 Fed. Rep. 326, 7 Am. B. R. 412; Landry v. Andrews, 21 R. I. 597, 6 Am. B. R. 281; *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 12 Am. B. R. 221; Harris v. 2d Nat. Bank, 110 Tenn. 239.

[5] Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 8 Am. B. R. 689; Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 10 Am. B. R. 25, 121 Fed. Rep. 723.

But see *In re* Levi, 121 Fed. Rep. 198, 9 Am. B. R. 176; *In re* Wyly, 116 Fed. Rep. 38, 8 Am. B. R. 604; *In re* New, 116 Fed. Rep. 116, 8 Am. B. R. 566.

check or note and not the giving of it that constitutes a preference,[6] but giving the note of a third person creates a preference.[7] Payments on account of loans constitute a preference, although the loans were made during the insolvency and within the four months' period.[8] Where a bank borrows one of its depositor's deposit and gives security therefor, the giving security creates a preference.[9] A payment to a bank to pay a note which the bank has discounted is a preference in favor of the person who had the note discounted.[10] Giving an order on another which is afterwards accepted and paid is a preference.[11] To pay for goods ten days after delivery is not a cash transaction but a preferential payment.[12] It is a voidable preference to return goods once purchased.[13] Payments to an endorsee who holds the note as collateral security for a debt of the payee are payments to the payee and a preference.[14] A payment which relieves a surety is a preference in favor of the surety.[15] It has been held to be a preference to pay any creditor in full while insolvent and leave others unpaid,[16] and it does not take it out of the general rule that the payment was made to a holder of a note overdue, on which there was a solvent indorser, whose liability was already

[6] *In re* Wolf & Levy, 122 Fed. Rep. 127, 10 Am. B. R. 153.

[7] *In re Crooks* v. Nat. Bank (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 238; Dickinson v. Security Bank (C. C. A. 4th Cir.), 110 Fed. Rep. 353, 6 Am. B. R. 551.

[8] *In re* Colton Export & Import Co. (C. C. A. 2d Cir.), 121 Fed. Rep. 663, 10 Am. B. R. 14.

[9] *In re* Cobb, 96 Fed. Rep. 821, 3 Am. B. R. 129.

[10] *In re* Waterbury Furniture Co., 114 Fed. Rep. 255, 8 Am. B. R. 79.

[11] *In re* Dundas, 111 Fed. Rep. 500, 7 Am. B. R. 129.

[12] *In re* Morrow & Co., 134 Fed. Rep. 686, 13 Am. B. R. 392.

[13] *In re* Andrews, 135 Fed. Rep. 599, 14 Am. B. R. 247.

[14] *In re* Meyer, 115 Fed. Rep. 997, 8 Am. B. R. 598.

[15] Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Crandall v. Coats, 133 Fed. Rep. 965, 13 Am. B .R. 712.

[16] Fox v. Gardner, 21 Wall. 475, 22 L. Ed. 685; *In re* Foley, 140 Fed. Rep. 300, 14 Am. B. R. 829; *In re* Oregon Bulletin Printing and Publishing Co., No. 10559 Fed. Cas., 13 N. B. R. 503; Silverman's Case, No. 12855 Fed. Cas., 1 Saw. 410; *In re* Dibblee, No. 3884 Fed. Cas., 3 Ben. 283, *sub nom* Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.

fixed,[17] or to pay a private debt out of partnership property,[18] or to pay an overdraft on a bank,[19] or either directly or indirectly, in contemplation of the filing of a petition by or against him, to pay money or transfer property to an attorney and counselor at law, solicitor in equity or proctor in admiralty for services to be rendered. Such transaction may be reexamined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.[20]

It is a preference for a clearing-house, having notice of the failure of a bank, to apply in its settlement of accounts the credit item to the payment of claims of other banks against the insolvent bank.[21] Such funds pass to the trustee in bankruptcy.

But, on the other hand, it has been held not to be a preference to pay rent for the purpose of preserving a valuable lease,[22] or to make payments and sales under a running account, where new sales succeed payments and the net result is to increase the indebtedness of the bankrupt, because the creditor does not obtain a greater percentage of his debt than other creditors,[23] or to pay wages because if there are sufficient

[17] Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866.

[18] *In re* Mattot, No. 9282 Fed. Cas., 16 N. B. R. 485.

[19] Payne v. Solman, No. 10856 Fed. Cas., 14 N. B. R. 162; *In re* Kellar, 110 Fed. Rep. 348, 6 Am. B. R. 621.

[20] B. A. 1898, Sec. 60*d*; Furth v. Stahl (Sup. Ct. Pa.), 205 Pa. 439, 10 Am. B. R. 442; *In re* Lewin, 4 Am. B. R. 632, 103 Fed. Rep. 850; *In re* Corbett, 5 Am. B. R. 224, 104 Fed. Rep. 872; *In re* Habegger (C. C. A. 8th Cir.), 139 Fed. Rep. 623, 15 Am. B. R. 198, Pratt v. Bothe (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 12 Am. B. R. 529; Swartz v. Frank, 183 Mo. 438. See also Sec. 41*a*, *ante*.

[21] Rector v. City Deposit Bank, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336; Rector v. Commercial Nat'l Bank, 200 U. S. 420, 50 L. Ed. 533, 15 Am. B. R. 347.

[22] *In re* Pearson, 95 Fed. Rep. 425, 2 Am. B. R. 482; Merchants' Insurance Co., No. 9441 Fed. Cas., 3 Biss. 162; *contra*, Smith v. Teutonia Ins. Co., No. 13113 Fed. Cas., 6 Am. Law Rev. 584.

In re Lange, 97 Fed. Rep. 197, 3 Am. B. R. 231, Judge Brown said: "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded."

[23] Jaquith v. Alden 189 U. S. 78,

assets to pay all labor claims of the same class in full, payments on account prior to the bankruptcy are immaterial as each creditor of that class is fully paid, and therefore there can be no preference of one over another,[24] or to repay a bank money advanced for a certain purpose on a check when not used for such purpose,[25] or to pay money on account of interest on statutory dower,[26] or to pay interest in advance for the renewal of a loan,[27] or to make fictitious book entries where no actual value passes,[28] or to collect book accounts assigned at the time the credit was given,[29] or to subsequently take possession of property or give security for a debt in accordance with an agreement made at the time the debt was created,[30] or to pay an old debt separate and distinct from an indebtedness arising upon an open account,[31] or to pay a percentage on

47 L. Ed. 717, 9 Am. B. R. 773; Yaple v. Dahl-Milliken Co., 193 U. S. 526, 48 L. Ed. 776, 11 Am. B. R. 569; Peterson v. Nash (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 7 Am. B. R. 181; *In re* H. C. King Co., 113 Fed. Rep. 110, 7 Am. B. R. 619; Dickson v. Wyman (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Sagor & Bro. (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 9 Am. B. R. 361; Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; Kimball v. Rosenham Co. (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 7 Am. B. R. 718.

Where the additional credits do not equal the payments the difference only need be surrendered. Gans v. Ellison (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 8 Am. B. R. 153; *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 12 Am. B. R. 221.

[24] *In re* Feuerlicht, 8 Am. B. R. 550; *In re* Reed & Knight, 7 Am. B. R. 111.

But see *In re* Kohn, 7 Am. B. R. 111 (note); *In re* Jones, 110 Fed. Rep. 736, 4 Am. B. R. 563; *In re* Proctor, 6 Am. B. R. 660.

[25] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

[26] *In re* Riddle's Sons, 122 Fed. Rep. 559, 10 Am. B. R. 204.

[27] *In re* Kellar, 110 Fed. Rep. 348, 6 Am. B. R. 621.

[28] *In re* Steam Vehicle Co., 121 Fed. Rep. 939, 10 Am. B. R. 385.

[29] *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681; Young v. Upson, 115 Fed. Rep. 192, 8 Am. B. R. 377.

[30] Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

But see *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554.

[31] *In re* Abraham Steers Lumber Co., 7 Am. B. R. 332, 112 Fed. Rep. 406; *In re* Seay, 7 Am. B. R. 700, 113 Fed. Rep. 969; *In re* Champion, 7 Am. B. R. 560; Dickson v. Wyman, 7 Am. B. R. 186, 111 Fed. 726.

claims of a part of the creditors when the others will receive the same percentage,[32] or to pay unearned premiums on policies on insurance,[33] or a payment made in full to a creditor by a third person as a friendly act.[34] The reason for this is that the fund to which the creditors look for payment is in nowise diminished. It has been held not to constitute a preferential payment that where mutual debts and credits have been adjusted in good faith by payments by the debtor,[35] for the acceptance and payment of a bill of exchange which had been given before insolvency after the debtor's insolvency was notorious,[36] or when a payment was made to a collection agency, whose attorney knew that it was a preference, but the creditor did not have cause to believe it.[37]

In the case of Abraham Steers Lumber Co., 112 Fed. Rep. 406, 7 Am. B. R. 332, the court says:

"The bankrupt was indebted to the creditor upon an open account, and at a date more than four months previous to the filing of the petition made a payment upon that account of money, and gave his note for the balance, which payment and note were treated by the creditor as full payment, and the account was balanced upon his books. The debtor was insolvent at the time, but the creditors had no reasonable cause to believe that preference was intended. Subsequently the bankrupt contracted another debt with the creditor. The question is, whether proof of that debt can not be allowed without a surrender by the creditor of the payment received upon the previous debt. We are of the opinion that the payment, notwithstanding it was a preference, being upon a distinct and independent debt than that which is sought to be proved, need not be surrendered by the creditor. . . . We do not deem it necessary to enlarge upon the reasons for our conclusions in respect to these questions. These are fully discussed in the opinion of Judge Thomas, who decided the case in the court below, and we fully concur in his views."

[32] Brittain Dry Goods Co. v. Bertenshaw, 68 Kan. 634; *In re* Hapgood, No. 6044 Fed. Cas., 2 Low. 200; Jones v. Sleeper, No. 7496 Fed. Cas., 2 N. Y. Leg. Obs. 131.

[33] Knickerbocker Ins. Co. v. Comstock, No. 7879 Fed. Cas., 9 N. B. R. 484.

[34] Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541; Goode v. Elwood Lodge, 160 Ind. 241; Keegan v. Hamilton Nat. Bank, 163 Ind. 216; Winsor v. Kendell, No. 17886 Fed. Cas., 3 Story, 507; Repplier v. Bloodgood, 1 Sweeney (N. Y. Sup. Ct.) 34.

[35] Robinson v. Ins. Co. Bank, No. 11969 Fed. Cas., 9 Biss. 117; Hough v. National Bank, No. 6721 Fed. Cass., 4 Biss. 349; Winslow v. Bliss, 3 Lansing (N. Y.) 220.

[36] *In re* Baxter, 28 Fed. Rep. 452.

[37] Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

The attorney's knowledge in this

A deposit of money in a bank subject to check within the four months' period is not a preferential payment.[38]

§ 196. Sales.

The law does not recognize that every sale of property by an embarrassed person within the period limited is necessarily in fraud of the bankrupt act.[1] If it were so, no one would know with whom he could safely deal; and, besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from the difficulty.

The interdiction in the act with reference to preferences applies to sales having a fraudulent object, and not to those with an honest purpose. Thus the transfer of property by an insolvent to a creditor, with the consent of all his other creditors, is not a preferential sale which can be set aside by the trustee.[2] So also a sale by a merchant of his entire stock of goods for full value, in the absence of fraud, can not be impeached.[3] It has also been held that a *bona fide* purchaser will be protected to the extent of the actual money paid as consideration.[4]

In order to set aside a sale on the ground that it is a preference, four things must concur: *First,* the sale must be made by an insolvent person to a creditor; *second,* the effect of such sale must be to enable that creditor to obtain a greater percentage of his debt than any other of such cred-

case was that of his principal—the collection agency—and not the creditors, who did not employ him.

[38] N. Y. County Bank v. Massey, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42; *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 12 Am. B. R. 221; *In re* Scherzer, 130 Fed. Rep. 631, 12 Am. B. R. 451.

[1] Tiffany v. Lucas, 15 Wall. 421, 21 L. Ed. 198; Rice v. Grafton Mills, 117 Mass. 228; Rice v. Melendy, 41 Iowa, 395; Sparhawk v. Richards, No. 13205 Fed. Cas., 12 N. B. R. 74; Sonstiby v. Keeley, 11 Fed. Rep. 578; Lancaster v. Collins, 7 Fed. Rep. 338; *In re* Strenz, 8 Fed. Rep. 311.

[3] Judson v. The Courier Co., 8 Fed. Rep. 422.

[3] *In re* Strenz, 8 Fed. Rep. 311. But see *In re* Moody, 14 Am. B. R. 272, 134 Fed. Rep. 628.

[4] Lancaster v. Collins, 7 Fed. Rep. 338; Sostiby v. Keeley, 11 Fed. Rep. 578.

itors of the same class; *third,* the creditor must have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth,* the sale must have been made within four months before filing the petition in bankruptcy, or after the filing of the petition and before the adjudication.[5] If any one of these elements is wanting, the sale can not be set aside as a preference. It should be borne in mind that a sale which is fraudulent under the common or statutory law may be avoided on another ground, although made more than four months before the filing of the petition.[6]

Whether a sale is a fraudulent preference or not depends upon the facts in the particular case. It has been held to be a preferential sale which could be avoided, where an insolvent sold to a creditor, knowing that he was receiving a preference, all his real and personal property, leaving other creditors unprovided for;[7] or, under similar circumstances, where a merchant transferred to one creditor his entire stock of goods;[8] or where a debtor transferred a large portion of his property to one creditor without making provision for an equal distribution among his other creditors;[9] or where property was transferred on the ground of exercising a factor's lien;[10] or a sale to a creditor through the intervention of an agent who pays the purchase price with notes of the bankrupt;[11] or a sale in consideration of an illegal agreement, as that creditor would not prosecute the debtor for a misde-

[5] B. A. 1898, Sec. 60. For a further consideration of these elements, see Preferences by transfers, Sec. 194 *et seq.*

[6] See Setting aside fraudulent conveyances, Sec. 203.

[7] Foster v. Hackley, No. 4971 Fed. Cas., 2 N. B. R. 406.

[8] Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489; Rison v. Knapp, No. 11861 Fed. Cas., 1 Dill. 187; Smith v. McLean, No. 13074 Fed. Cas., 10 N. B. R. 260; Norton v. Billings, 4 Fed. Rep. 623; Singer v. Jacobs, 11 Fed. Rep. 559.

[9] Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Merchants' Nat. Bank v. Cook, 95 U. S. 342, 24 L. Ed. 412.

In re Drummond, No. 4094 Fed. Cas., 4 Biss. 149; *In re* House, No. 6735 Fed. Cas., 1 N. Y. Leg. Obs. 348; *In re* Foster, No. 4964 Fed. Cas., 18 N. B. R. 64; Nisbet v. Quinn, 7 Fed. Rep. 760.

[10] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286.

[11] Fleming v. Andrews, 3 Fed. Rep. 632.

meanor;[12] or a sale to a bank to make good an overdraft;[13] or generally any sale the consideration of which is a preexisting debt;[14] or where firm property is conveyed to a continuing partner.[15] But the conveyance of property to a creditor who has a valid lien on such property to a greater amount than the value of it is not a preferential sale.[16] It is otherwise where the lien is invalid.[17]

The return of goods which has been purchased on credit creates a preference.[18]

Conditional Sales.—Whether a sale to a person, who subsequently becomes a bankrupt, on condition that the title shall remain in the seller constitutes a valid lien as against the trustee of the vendee depends upon whether the arrangement between the seller and the purchaser is valid under the local law. If valid the lien may be enforced in the bankruptcy proceedings.[19] If it is invalid the property passes to the trustee.[20] In respect to such property it was held in the earlier

[12] Sharp v. Philadelphia Warehouse Co., 10 Fed. Rep. 379.

[13] Alderdice v. State aBnk, No. 154 Fed. Cas., 1 Hughes, 47.

[14] Post v. Corbin, No. 11299 Fed. Cas., 5 N. B. R. 11; *Ex parte* Shouse, No. 12815 Fed. Cas., Crabbe, 482. See also Casey v. La Societie, etc., No. 2496 Fed. Cas., 2 Woods, 77; Armstrong v. Chemical National Bank, 41 Fed. Rep. 234.

[15] *In re* Kindt, 101 Fed. Rep. 107, 4 Am. B. R. 148; Collins v. Hood, 3015 Fed. Cas., 4 McLean, 186; *In re* Johnson, No. 7369 Fed. Cas., 2 Low. 129. 129; *In re* Waite, No. 17044 Fed. Cas., 1 Low. 207; *In re* Federhen, No. 4713*a* Fed. Cas., referred to *In re* Lane, No. 8044 Fed. Cas., 2 Low. 333. But see Forsaith v. Merritt, No. 4946 Fed. Cas., 1 Saw. 336; *In re* Shepard, No. 12754 Fed. Cas., 3 Ben. 347; Smith v. McLean, No. 13074 eFd. Cas., 10 N. B. R. 260. See also Johnston v. Strauss, 26 Fed. Rep. 57.

[16] Coxe v. Hale, No. 3310 Fed. Cas., 10 Blatch. 56; Catlin v. Hoffman, No. 2521 Fed. Cas., 2 Saw. 486; Ashuelot Sav. Bank v. Frost, 19 Fed. Rep. 237.

[17] *In re* Gregg, No. 5797 Fed. Cas., 4 N. B. R. 456.

[18] Silberstein v. Stahl, 4 Am. B. R. 626; *In re* Klingaman, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re* Andrews, 135 Fed. Rep. 599, 14 Am. B. R. 247.

[19] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Hewit v. Berlin Mfg. Co., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Shirley (C. C .A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Cavagnaro, 143 Fed. Rep. 668, 16 Am. B. R. 320. See Sec. 152*a*, *ante*.

[20] *In re* Butterwick, 131 Fed. Rep.

cases that the trustee occupied the position of a judgment or attaching creditor from the date of the filing of the petition in bankruptcy, which was held to have the effect of an attachment or seizure under legal process.[21] When the question reached the supreme court, it held that an adjudication in bankruptcy is not equivalent to a seizure or an attachment of the debtor's property, and that a conditional sale valid as between the bankrupt vendee and the vendor at the time of bankruptcy under the state law is valid as against the trustees.[22] If such conditional sale contract is invalid as against creditors at the date of bankruptcy it may be avoided by the trustee under Section *67a* of the bankruptcy act.

§ 197. Mortgages.

The law applicable to mortgages and liens is much too extensive to be discussed at length in this treatise. The present inquiry will be confined to what constitutes a preference by way of mortgages under the bankrupt law. A debt may be secured by a mortgage on real estate or personal property. The principles, so far as bankruptcy proceedings are concerned, are substantially the same with reference to real estate and chattel mortgages.

It is as much the policy of the bankruptcy act to uphold mortgages when valid, as it is to set them aside when invalid. A mortgage valid under the state law, which is not a violation of any of the provisions of the bankruptcy act, will be respected and enforced by a court of bankruptcy.[1] The mort-

371, 12 Am. B. R. 536; *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Rasmussen's Estate, 136 Fed. Rep. 704, 14 Am. B. R. 462. See Sec. 152*a*, *ante*.

[21] *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; Dolle v. Cassell (C C. A. 6th Cir.), 135 Fed. Rep. 52, 14 Am. B. R. 52; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760.

[22] York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[1] B. A. 1898, Secs. 60 and *67d;*

gage which the law condemns is one, *first,* which constitutes a preference,[2] or, *second,* which is invalid as against the claims of creditors under the state law,[3] or, *third,* which was given with the intent to hinder, delay or defraud creditors.[4]

A valid mortgage may be extinguished by accepting part payment of the debt and releasing the remainder so that it can not be asserted subsequently in bankruptcy proceedings.[5]

With reference to mortgages, the trustee takes the property of the bankrupt in the same plight in which the bankrupt held it at the time the petition in bankruptcy was filed. He does not take as a purchaser,[6] or as an attachment or judgment creditor.[7] He simply stands in the shoes of the bankrupt with no better right or title to the bankrupt's property than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued.[8] A mortgage, therefore, which is valid as against the bankrupt at the date of the bankruptcy, under the state law and not voidable under any provision of the bankruptcy act, is valid as against the trustee in bankruptcy of the mortgagor, except in so far as creditors have vested rights at that time, which are valid as against the mortgagee. In such cases the trustee may be subrogated to the rights of such creditors for the benefit of the estate.[9] A trustee in bankruptcy is entitled, upon paying a mortgagee,

Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302.

[2] B. A. 1898, Sec. 60.

[3] B. A. 1898, Secs. 67*a* and 67*e*.

[4] B. A. 1898, Sec. 67*e*. See Sec. 160, *ante*.

[5] *In re* Thompson (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 11 Am. B. R. 719.

[6] Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

[7] York Manufacturing Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[8] York Manufacturing Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986 11 Am. B. R. 709; *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; *In re* Lurkens, 138 Fed. Rep. 188, 14 Am. B. R. 683.

[9] B. A. 1898, Sec. 67*b*. *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am B. R. 615.

to have the mortgage assigned to him for the benefit of the estate.[10]

It may be observed that a trustee is expressly authorized to avoid a mortgage, as a preference, which is valid as between the bankrupt and the mortgagee,[11] or one given within the four months' period to hinder, delay or defraud creditors,[12] which could not be set aside by the bankrupt, or one which for want of record or other reason is not valid as a lien as against the claims of creditors,[13] although it is valid as between the mortgagor and mortgagee. In these cases the trustee is vested with the rights of creditors in addition to the title of the bankrupt.

§ 197a. Mortgages made in good faith for a present consideration.

The bankrupt act expressly recognizes as valid mortgages "given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice." [1] No express provision appeared for this class of security in the act of 1867, but the supreme court applied this rule in cases arising under that act.[2]

To come within the protection of Section 67*d* of the bank-

[10] *In re* Bacon, 132 Fed. Rep. 157, 12 Am. B. R. 730.

[11] B. A. 1898, Sec. 60*b*. See also Sec. 197*b*, *post*.

[12] B. A. 1898, Sec. 67*e*. See also Sec. 160, *ante*.

[13] B. A. 1898, Sec. 67*a*. See also Secs. 197*c* and 197*d*, post.

[1] B. A. 1898, Sec. 67*d*.

[2] In Tiffany v. Boatman's Institution, 18 Wallace, 375, 388, 21 L. Ed. 868, the court said:

"There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition [an insolvent], if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, and without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be

ruptcy act it is essential, *first*, that the mortgage be given and accepted in good faith without any fraudulent intent or purpose; *second*, that it be given for a present consideration, and *third*, that it be recorded if recording is necessary to its validity under the state law.

There is no limitation as to time. It may be made within four months prior to the filing of the petition in bankruptcy.[3]

The fact that the mortgagor was insolvent at the time the mortgage is given and that the mortgagee knew it does not affect the validity of a mortgage given in good faith and for a present consideration.[4] The reason is that the debtor's estate is not impaired or diminished in consequence, as he gets a present equivalent for the security pledged for the money borrowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. A preference can only arise in case of an antecedent debt.

First. A mortgage to be sustained under Section 67*d* of the bankrupt act must be given and accepted in good faith and not in contemplation of or in fraud upon the bankrupt act. It is essential that the transaction should be *bona fides*. The purpose must be honest and the object not fraudulent. If the parties act in good faith, contemplating no fraud upon the act, the security is valid,[5] while *mala fides* will render the mortgage invalid.[6] In the case of bad faith, the mortgage may be invalidated by Section 67*e*.[7]

an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable."

[3] Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; Davis v. Turner (C. C. A. 4th Cir.), 120 Fed. Rep. 605, 9 Am. B. R. 704.

[4] *In re* Soudan Mfg. Co., 113 Fed. Rep. 804, 8 Am. B. R. 45; Davis v. Turner (C. C. A. 4th Cir.), 120 Fed. Rep. 605, 9 Am. B. R. 704.

[5] *In re* Soudan Mfg. Co., 113 Fed. Rep. 804, 8 Am. B. R. 45; Phillipps v. Kahn, 96 App. Div. N. Y. Sup. Ct. 166, 89 N. Y. Supp. 250.

[6] *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; Rogers v. Page (C. C. A. 6th Cir.), 140 Fed. Rep. 596, 15 Am. B. R. 502; Clayton v. Exchange Bank (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 10 Am. B. R. 173, reversing *In re* Josephson, 116 Fed. Rep. 404, 8 Am. B. R. 423.

[7] Pollock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B.

Whether the mortgage is given or accepted in good faith is a question of fact to be determined by the facts and circumstances of each particular case.

Second. It is essential to the validity of a mortgage under 67*d* that the debt to be secured is created at the time that the mortgage is given. If the debt existed at that time a preference may arise under Section 60. A mortgage given within four months of bankruptcy to secure a loan made at the time, is valid, provided the purpose be honest and the object not fraudulent.[8] The mere fact that the mortgagor intends to use the money to pay other creditors and thereby create a preference will not invalidate the security.[9]

Where a mortgage is given to secure a present loan and a preexisting debt, it may be sustained to the extent of the loan made at the time the mortgage was given and be invalid to the extent of the pre-existing debt secured thereby.[10] Mortgages have been sustained when given in pursuance of a valid promise made at the time of the loan, where it was shown that the promise was to give a specific security and that the promise

R. 616, affirming *In re* Jones, 118 Fed. Rep. 673, 9 Am. B. R. 262; *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245; *In re* Steininger Mercantile Co. (C. C. A. 5th Cir.), 107 Fed. Rep. 669, 6 Am. B. R. 68; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278; *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re* Moody, 134 Fed. Rep. 628, 14 Am. B. R. 272. See Sec. 160, *ante*.

[8] Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302; *In re* Clifford, 136 Fed. Rep. 475; 14 Am. B. R. 281; *In re* Josephson, 116 Fed. Rep. 404, 8 Am. B. R. 423, reversed on question fact of *bona fides* in Clayton v. Exchange Bank (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 10 Am. B. R. 173.

[9] *In re* Davidson, 109 Fed. Rep. 882, 5 Am. B. R. 528; Stedman v. Bank of Monroe, 117 Fed. Rep. 237, 9 Fed. Rep. 4; *In re* Soudan Mfg. Co., 113 Fed. Rep. 804, 8 Am. B. R. 45.

[10] City National Bank v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 6 Am. B. R. 311; Stedman v. Bank of Monroe, 117 Fed. Rep. 237, 9 Am. B. R. 4; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; *In re* Dismal Swamp Construction Co., 135 Fed. Rep. 415, 14 Am. B. R. 175; *In re* Sawyer, 130 Fed. Rep. 384, 12 Am. B. R. 269; *In re* Hull, 115 Am. B. R. 858, 8 Am. B. R. 302; *In re* Wolf, 98 Fed. Rep. 84, 3 Am. B. R. 555; *In re* Furse & Co. (C. C. A. 4th Cir.), 127 Fed. Rep. 690, 11 Am. B. R. 733.

was given as an inducement upon which the loan was made.[11] But a chattel mortgage, given within four months in pursuance of an agreement "to give security" generally, made at the time of the loan prior to that period, can not be sustained as a mortgage made in good faith for a present consideration.[12]

A mortgage has been held valid when given to secure future advances to be made to the debtor.[13] A mortgage may be taken in exchange for a prior valid security without affecting its validity.[14] This is an exchange of securities, which ordinarily is not deemed a violation of the bankrupt law,[15] but if the security surrendered to the bankrupt is of less value than the mortgage given there may be a preference created to the extent of the difference.[16] A mortgage may be renewed within the four months' period without invalidating it.[17]

Third. How far the failure to record a mortgage affects its validity depends upon the local law as construed by the courts of the state.[18] Under the ruling of the supreme court in the

[11] *In re* Jackson Iron Manufacturing Co., No. 7153 Fed. Cas., 15 N. B. R. 438; Brudock v. Jackson, 15 N. B. R. 318; Douglass v. Vogeler, 6 Fed. Rep. 52; Gattman v. Honea, No. 5271 Fed. Cas., 12 N. B. R. 493; Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

[12] *In re* Ronk, 111 Fed. Rep. 154, 7 Am. B. R. 731; *In re* Dismal Swamp Construction Co., 135 Fed. Rep. 415, 14 Am. B. R. 175; Polock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B. R. 616; Lloyd v. Strobridge, No. 8435 Fed. Cases, 16 N. B. R. 107.

[13] *Ex parte* Ames, No. 323 Fed. Cases, 1 Low. 561; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

[14] Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; Burnhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; *In re* Davidson, 109 Fed. Rep. 882, 5 Am. B. R. 528.

[15] Cook v. Tullis, 18 Wall. 340, 21 L. Ed. 933; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.

[16] *In re* Manning, 123 Fed. Rep. 181, 10 Am. B. R. 500.

[17] *In re* Little River Lumber Co., 92 Fed. Rep. 585, 1 Am. B. R. 483; Chattanooga National Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441; Deland v. Miller and Cheney Bank, 119 Iowa 368, 93 N. W. Rep. 304; *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715.

[18] *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; *In re* Clifford, 136 Am. B. R. 475, 14 Am. B. R. 281; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359; *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299.

case of *York Manufacturing Company* v. *Cassell*[19] the failure to record does not invalidate a mortgage as between the mortgagee and the trustee in bankruptcy, unless creditors could successfully attack the mortgage at the time bankruptcy proceedings were instituted.[20]

§ 197b. Mortgages as preferences.

A mortgage, otherwise valid, may be avoided as a lien because it constitutes a preference in bankruptcy. This is so, not because such mortgages are fraudulent at common law, or by the statutes of the states, or are immoral or dishonest, but simply because the statute says they are voidable. Such mortgages are valid as between a mortgagee and the bankrupt. A trustee, taking only the title of the bankrupt, could not attack their validity, except as power is expressly given him by the bankrupt act. Such power is conferred on him by Section 60*b*.

In order that a mortgage security for a debt may be set aside as a voidable preference, four things must concur;[1] namely, *First,* the mortgage must have been given by an insolvent person to a creditor; *second,* the effect of such mortgage must be to enable such creditor to obtain a greater percentage of his debts than any other of such creditors of the same class; *third,* the creditors receiving the mortgage must have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth*, the mortgage must have been made within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.

If any element of the combination is wanting, the mortgage being valid under the state law, there is no infringement of the bankrupt law.[2]

[19] 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[20] See Sec. 197*d*, *post*.

[1] B. A. 1898, Sec. 60. *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416. For further consideration of these elements as to preferences generally, see Sections 194 *et seq.*

[2] Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am.

First. It will not constitute a preference for a person other than a bankrupt to mortgage his own property to secure the debt of a bankrupt, or where a solvent debtor gives a mortgage, even within the four months' period, to secure his own debt.[3]

The mortgage must be given to a creditor, but if it is given to a third person in trust for him, it does not prevent its being a preference.[4]

Second. The effect of such a mortgage must be to enable the creditor to obtain a greater percentage of his debt than any other of such creditors of the same class. This can occur only in the case of security given for a pre-existing debt.[5] If a chattel mortgage executed at the time the loan is made, creates at that time a lien on specific chattels, no preference is created; but if the mortgage is to an unidentified part of a mass, a lien is not created until there is a separation and at that time is for an antecedent debt and so a preference.[6] A mortgage given to secure a pre-existing debt, although a promise to give "security when required" was made at the time when the debt was created, is invalid.[7] But it is otherwise where the promise was to give specific security as an inducement for an advance.[8] Where a mortgage is given to secure a present loan and a pre-existing debt, it is invalid as a preference to the extent of the pre-existing debt secured thereby.[9]

B. R. 437; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Clifford, 136 Fed. Rep. 475, 14 Am. B. R. 281; Empire State Trust Co. v. Fisher Co., 67 N. J. Eq. 88; *In re* Virginia Hardwood Mfg. Co., 139 Fed. Rep. 209, 15 Am. B. R. 135.

[3] Empire State Trust Co. v. Fisher Co., 67 N. J. Eq. 88. See Sec. 194*a*, *ante*.

[4] *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345.

[5] *In re* Clifford, 136 Fed. Rep. 475, 14 Am. B. R. 281.

[6] First Nat. Bank of Holdredge v. Johnson, 68 Neb. 641, 10 Am. B. R. 208.

[7] Pollock v. Jones (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 10 Am. B. R. 616; *In re* Dismal Swamp Construction Co., 135 Fed. Rep. 415, 14 Am. B. R. 175; *In re* Ronk, 111 Fed. Rep. 154, 7 Am. B. R. 731.

[8] Douglass v. Vogeler, 6 Fed. Rep. 52; *In re* Jackson Iron Manfacturing Co., No. 7153 Fed. Cas., 15 N. B. R. 438; Burdock v. Jackson, 15 N. B. R. 318; Gattman v. Honea, No. 5271 Fed. Cas., 12 N. B. R. 493; Sabin v. Camp, 98 Fed. Rep. 974, 3 Am. B. R. 578.

[9] City National Bank v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 6 Am. B. R. 311; Stedman v. Bank of Monroe, 117 Fed. Rep. 237, 9

It has been held that a note of a partner given to pay a firm debt, which was secured by mortgage upon the individual property of the partner, was a fraudulent preference.[10] The reason is that it was in effect an appropriation of so much of the separate estate of the partner to the payment of one creditor's debt to the prejudice and wrong of other creditors of the firm to whom any surplus of such estate, after the payment of his individual debts, justly belonged. But a mortgage by a partnership of partnership property does not create a preference in favor of the mortgagee as against the trustee in bankruptcy of one of the partners.[11]

Third. It is an essential element of a preference that the mortgagee have reasonable cause to believe that it was intended to give him a preference.[12] The rules relating to what constitutes "a reasonable cause to believe a preference was intended to be given" have been considered in another place and what is there said is applicable to mortgages.[13]

Fourth. It is an essential element of a mortgage preference, which may be avoided by a trustee, that the mortgage be given within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.[14]

A mortgage valid under the state law, made before the four months' period, is valid as against the trustee of the mortgagor.[15] Where such a mortgage covers after acquired

115 Fed. Rep. 858, 8 Am. B. R. 302; *In re* Wolf, 98 Fed. Rep. 84, 3 Am. B. R. 555; *In re* Furse & Co. (C. CS. A. 4th Cir.), 127 Fed. Rep. 690, 11 Am. B. R. 733.

[10] *In re* Parker, 11 Fed. Rep. 397.

[11] *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638.

[12] *In re* Virginia Hardwood Mfg. Co., 139 Fed. Rep. 209, 15 Am. B. R. 135; Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stuckey v. Savings Bank, 108 U. S. 74, 27 Am. B. R. 4; *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115; *In re* Dismal Swamp Construction Co., 135 Fed. Rep. 415, 14 Am. B R. 175; *In re* Sawyer, 130 Fed. Rep 384, 12 Am. B. R. 269; *In re* Hull, L. Ed. 640; Summerville v. Stockton Milling Co., 142 Cal. 529.

[13] Sec. 194*c*, *ante*.

[14] B. A. 1898, Sec. 60.

for a discussion of this element generally, see Sec. 194*d*, *ante*.

[15] Humphrey v. Tatman, 198 U S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am.

property, it is not a preferential transfer for a mortgagee to take possession of such after-acquired property within the four months' period, although the mortgagee may have known that the mortgagor was insolvent and considering going into bankruptcy and a petition be filed within four months thereafter.[16] If it appears that the taking of possession of mortgaged property is done to hinder, delay or defraud creditors such transfer would be invalid under Sec. 67*e* of the bankruptcy law.[17]

Prior to the amendment of February 5, 1903,[18] it was generally held that the four months' period began to run from the date the mortgage was made and not from the date of recording.[19] The amendment provides that "where a preference consists in a transfer such period of four months shall not expire until after the date of recording or registering of the transfer, if by law such recording or registering is required." [20]

B. R. 437; Curry v. McCauley, 20 Fed. Rep. 583; Judson v. Courier Co., 25 Fed. Rep. 705; Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 396 14 Am. B. R. 477; Carton v. Booze, 68 N. J. Chan. 771, 57 Atl. Rep. 1029; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615.

It should be borne in mind that the time limit under the original act of 1867, Secs. 35 and 39 (R. S. Sec. 5128), was four months. But this was changed to two months by the act of June 22, 1874, Secs. 10 and 11, 18 Stat. at L. 180; Auffm'ordt v. Rasin, 102 U. S. 620, 26 L. Ed. 262.

[16] Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Fisher v. Zollinger (C. C. A. 6th Cir.), 149 Fed. Rep. 54; *In re* National Valve Co., 140 Fed. Rep. 679, 15 Am. B. R. 524; *In re* Rogers & Woodward, 132 Fed. Rep. 560, 13 Am. B. R. 75. See also *In re* Sentenne and Green Co., 120 Fed. Rep. 436, 9 Am. B. R. 648.

But see *In re* Marine, etc., Dock Co. (C. C. A. 2d Cir.), 144 Fed. 649, 16 Am. B. R. 325.

[17] *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359. See Sec. 160, *ante*.

[18] 32 Stat. at L. 797.

[19] Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 12 Am. B. R. 74.

[20] B. A. 1898, Sec. 60*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

In applying this provision the courts differ as to the meaning of the word "required." The better rule is that if a mortgage is subject to record under the laws of the state it is required to be recorded within the meaning of this provision.[21] The reason for this amendment and the construction to be given it has already been considered.[22]

In computing the four months, the first day is excluded and the last is included unless the last day falls on a Sunday or a holiday, in which event the last day included shall be the next day thereafter which is not Sunday or a legal holiday.[23]

§ 197c. Mortgages invalid under state laws.

Any mortgage or other claim which, for want of record or other reason, is not a valid lien as against the claims of the creditors of the bankrupt, is not a lien against his estate.[1]

The validity of such mortgages or claims does not depend upon the time at which they are made or recorded, unless invalidated for this reason under provisions of the state law. There is no four months' limitation as in the case of preferences.

Whether and to what extent a mortgage or claim of this kind is valid is a local question and the decisions of the state court will be followed by the courts of bankruptcy.[2] If at the

[21] Loeser v. Savings Deposit Bank & Trust Co. (C. C. A. 6th Cir.), 148 Fed. Rep. 975; First Nat. Bank v. Connett (C. C. A. 8th Cir.), 142 Fed. Rep. 33, 15 Am. B. R. 662; English v. Ross, 140 Fed. Rep. 630, 15 Am. B. R. 370.

But see Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 14 Am. B. R. 477; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416.

[22] See Sec. 194*d*.

[23] B. A. 1898, Sec. 31; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; Jones v. Stephens, 94 Me. 582, 5 Am. B. R. 571; Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130.

[1] B. A. 1898, Sec. 67*a*. Bank of Leavenworth v. Hunt, 11 Wall. 391, 20 L. Ed. 190; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080, Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; *In re* Birck (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 15 Am. B. R. 694; *In re* Hemstreet, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re* Miller, 118 Fed. Rep. 360, 9 Am. B. R. 274.

[2] Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Thompson v. Fairbanks, 196 U. S.

date of bankruptcy a creditor has a claim or mortgage valid as against the bankrupt and other creditors under the state law and not contrary to any provision of the bankruptcy act, it is valid as against the trustee in bankruptcy.[3] But if a mortgage or other claim is invalid, as a lien, in whole or in part, under the local law as against the bankrupt or any of his creditors at the date of bankruptcy it may be avoided by the trustee to the extent of such invalidity.[4] In such cases the trustee is vested with the title of the bankrupt together with the rights of creditors at the date his title accrues.[5] Where a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by the bankrupt the trustee may be subrogated to his rights and enforce them for the benefit of the estate.[6]

It has been held that a mortgage upon property exempt by the state statute is valid and the security is preserved notwithstanding the bankruptcy of the debtor.[7] Where property lying

516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Andrae Co., 117 Fed. Rep. 561, 9 Am. B. R. 135.

[3] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74.

[4] B. A. 1898, Sec. 67*a*. Second Bank of Leavenworth v. Hunt, 11 Wall. 391, 20 L. Ed. 190; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; *In re* Birck (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 15 Am. B. R. 694; *In re* Hemstreet, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re* Miller, 118 Fed. Rep. 360, 9 Am. B. R. 274

[5] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; *In re* Lukens, 138 Fed. Rep. 188, 14 Am. B. R. 683; First National Bank v. Staake, 202 U. S. 141, 149, 50 L. Ed. 967, 15 Am. B. R. 639.

[6] B. A. 1898, Sec. 67*b*. First Nat'l Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; *In re* Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615.

[7] Long v. Bullard, 117 U. S. 617, 29 L. Ed. 1004; Schlitz v. Schatz, No. 12459 Fed. Cas., 2 Biss. 248; Rix v. Capital Bank, No. 11869 Fed. Cas., 2 Dill. 367.

in two states is mortgaged in one deed, it may be a valid security as to the property in one state and not as to the property in the other.[8] Where the taking of possession of after-acquired property under a valid mortgage is valid under the state law it is valid as against the trustee in bankruptcy.[9] Where a chattel mortgage is given with leave to the mortgagor to sell or use a part of the property covered by the mortgage the mortgage is usually good as to the property unsold or unused at the date of bankruptcy and invalid as to the property sold.[10] An agreement to allow the mortgagee to dispose of the property, by which the proceeds of the goods are applied to the payment of the mortgage debt, may be sustained.[11] Where property is delivered to the vendee for consumption or sale or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction will not be upheld as a conditional sale, because it is a fraud upon the creditors of the vendee.[12] Mortgages which are fraudulent and could not be enforced in a court of equity, irrespective of the bankruptcy law, may be avoided in bankruptcy.[13] Where a deed, which purports to transfer the title to land to a creditor to secure a debt, but which is void for usury can not be enforced as to other creditors in bank-

[8] *In re* Soldiers, Business, Messenger Dispatch Co., No. 13163 Fed. Cas., 3 Ben. 204.

[9] Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

[10] *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 8 Am. B. R. 45; *In re* Ball, 123 Fed. Rep. 164, 10 Am. B. R. 564; *In re* Antigo Screen Door Co., 123 Fed. Rep. 249, 10 Am. B. R. 359; *In re* Marine Dry Dock Co., 135 Fed. Rep. 921, 14 Am. B. R. 466; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.

[11] *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

[12] *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re* Ramussen's Estate, 136 Fed. Rep. 704, 14 Am. B. R. 462.

[13] Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758; Crooks v. Stuart, 7 Fed. Rep. 800; *In re* Hemstreet, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.

ruptcy.[14] Where a state statute provides that "any chattel mortgage securing notes, which do not state upon their face the fact of such security, shall be absolutely void," the holder of such a note and of a chattel mortgage purporting to secure the same has no lien upon the property, even though he has taken possession of the same, which can be enforced as against the trustee in bankruptcy of the mortgagor.[15]

Whether or not a mortgagee waives or loses his lien by attaching the mortgaged property depends upon the state law.

§ 197d. Mortgages and other liens invalid for want of record.

A mortgage, conditional sale or other claim to property may be avoided as a lien for want of record if it would not have been a valid lien as against the claims of creditors.[1]

In such cases the trustee is vested not only with the title of the bankrupt, but also that of the creditors at the date when his title accrues.[2] Whether the date, at which the rights of creditors as to unrecorded liens are fixed, is the date the petition is filed or the date of adjudication, has not been determined by the courts. The title of the trustee vests as of the date of the adjudication,[3] but he takes the class of property which is ordinarily subjected to mortgage and other liens, owned by the bankrupt at the date the petition in bankruptcy is filed.[4] It is fair to conclude that the date of filing the petition in bankruptcy is the date at which the rights of the bankrupt and the creditors are fixed with respect to record.

[14] *In re* Miller, 118 Fed. Rep. 360, 9 Am. B. R. 274.

[15] *In re* Birck (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 15 Am. B. R. 694.

[1] B. A. 1898, Sec. 67*a*.

[2] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Lukens, 138 Fed. Rep. 188, 14 Am. B. R. 683; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; 1st Nat'l Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697.

[3] B. A. 1898, Sec. 70*a*.

[4] B. A. 1898, Sec. 70*a*, clause 5.

For a time the courts held that a trustee could avoid any lien for want of record, which was invalidated as to an attachment or execution creditor.[5] This doctrine was founded upon the observation of the supreme court in *Mueller* v. *Nugent*[6] "that the filing of the petition is a *caveat* to all the world and in effect an attachment and injunction." The bankruptcy proceedings were therefore in effect a seizure or attachment by all the creditors. The trustee representing them was held to succeed to their rights as creditors having fastened upon the property by legal process. When the question was presented to the supreme court it decided that the trustee was not vested with such power.[7] Bankruptcy proceedings, therefore, do not clothe the trustee with any greater power in this respect than the creditors would have had if bankruptcy had not intervened. He can do for the estate what the creditors could have done and no more.

The recording or registering laws of the several states are not alike. The effect of failing to record a security varies according to these statutes as construed by the local courts.[8] It is necessary to consult the law as declared by the statutes and decisions of the state, which control in the particular case, to determine whether a mortgage or other lien is invalid for want of record as against creditors in such state. If so, it is invalid to the same extent in case of the bankruptcy of the mortgagor or lienor. The invalidity of liens for want of record depends upon the law of the state where the property is located.[9]

[5] *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* First Nat'l Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180.

[6] 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

[7] York Mfg. Co. v. Cassell (C. C. A. 6th Cir.), 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[8] *In re* International Mahogany Co. (C. C. A. 2d Cir.), 147 Fed. Rep. 147; *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

[9] *In re* Greene, 134 Fed. Rep. 137, 13 Am. B. R. 504; *In re* Legg, 96 Fed. Rep. 326; *In re* Andrae Co., 117 Fed. Rep. 561, 9 Am. B. R. 135.

In some state s an unrecorded mortgage or conditional sale contract is invalid as a lien, as against the claims of general creditors of the mortgagor or vendor.[10] In such states the owner of the unrecorded security ranks with and has no priority over the claims of the other creditors.

In some states an unrecorded mortgage or conditional sale contract is invalid as a lien only as against the claims of creditors who have actually seized the property under the legal process as by levy of execution or an attachment.[11] Where property is sold, price paid and possession taken under a contract of sale, but the deed is not executed or recorded until after a judgment creditor levies on the property, the judgment creditor's rights are superior to those of the grantee under the unrecorded deed and they may be enforced by the trustee of the grantor.[12]

In some states a mortgage or conditional sale contract is invalid as a lien, as against the claims of subsequent contract creditors without notice.[13] It may be a valid lien as to the claims of antecedent creditors or subsequent creditors with notice. It has been held that where the assets of the bankrupt covered by such a mortgage were not sufficient to pay subsequent creditors, they take the whole fund to the exclusion of antecedent creditors.[14] The reason for this is that as the mortgage is valid as to the antecedent creditors, all claims of the antecedent creditors are extinguished by the mortgage, and as between the mortgagee and subsquent creditors, the rights of the latter must prevail.

[10] *In re* Andrae Co., 117 Fed. Rep. 561, 9 Am. B. R. 135; English v. Ross (C. C. A. 8th Cir.), 140 Fed. Rep. 630, 15 Am. B. R. 370; *In re* Lukens, 138 Fed. Rep. 188, 14 Am. B. R. 683; *In re* Montague, 143 Fed. Rep. 428, 16 Am. B. R. 18.

[11] *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re* Shirly (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299.

[12] First Nat'l. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[13] *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 13 Am. B. R. 760; *In re* Sewell, 111 Fed. Rep. 791, 7 Am. B. R. 133; *In re* Cannon, 121 Fed. Rep. 582, 10 Am. B. R. 64; *In re* Cavagnaro, 143 Fed. Rep. 668, 16 Am. B. R. 320.

[14] *In re* Cannon, 121 Fed. Rep. 582, 10 Am. B. R. 64.

As a general rule the failure to record or register a mortgage does not invalidate it as a lien, but merely postpones it to superior claims; thus, an unrecorded mortgage is subordinate to a subsequent mortgage which has been duly recorded, but it may be valid as to general creditors or antecedent creditors or subsequent creditors with notice. The courts of bankruptcy will enforce the rights of creditors as they exist under the state law at the time of bankruptcy.

The taking possession by a mortgagee under a chattel mortgage or conditional sale is equivalent to recording. The effect of such taking possession is to be determined by the state law and the courts of bankruptcy will follow the decisions of the state courts as to the effect of such proceeding.[15]

The mere fact of failing to record a mortgage or conditional sale contract or to take possession of the property is not sufficient to render it invalid, as has been pointed out in this section, but if the mortgagee or vendee withholds the instrument from record by a deliberate agreement for the purpose of aiding the credit of the mortgagor or vendor, or to allow the four months to run so as to defeat the provisions of the bankruptcy act relating to preferences and intending so to do when he took it, such acts constitute a fraud upon the creditors and renders the mortgage or conditional sale contract invalid.[16]

It should be observed that a failure to record an instrument or the recording of it within four months may render it invalid as a preference, provided the other elements necessary to constitute a preference exist.[17]

[15] Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; Fisher v. Zollinger (C. C. A. 6th Cir.), 149 Fed. Rep. 54; *In re* Marine, etc. Dock Co. (C. C. A. 2d Cir.), 144 Fed. Rep. 649, 16 Am. B. R. 325.

[16] Bennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080; Clayton v. Exchange Bank (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 10 Am. B. R. 173; Rogers v. Page, 140 Fed. Rep. 596, 15 Am. B. R. 502; *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; *In re* Ewald & Brainard, 135 Fed. Rep. 168, 14 Am. B. R. 267.

[17] As to the effect of failing to record, see Sec. 194*d*, *ante*. As to the elements necessary to constitute a preference, see Sec. 194 *et seq.*, *ante*.

§ 198. Pledges.

A security by way of pledge or pawn is a species of mortgage. The difference ordinarily recognized between a mortgage and a pledge is, that the title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge.

A pledge is confined to personal property capable of delivery and is created by the mere delivery of such property to some other person as security for money advanced or to be advanced. Collateral security is the term generally used to designate a pledge of negotiable paper, corporate stocks or other incorporeal personality, as distinguished from a pledge of corporeal chattels.

An equitable interest in property incapable of delivery can not be pledged, but an equitable lien may be impressed upon the property which will be enforced by a court of equity.[1] A pledge differs from a lien in that a pledgee may enforce his security without the aid of a court, but a lien can only be enforced through judicial proceedings.

In order to constitute a pledge an actual or symbolic delivery of property capable of personal possession is essential and to preserve it the pledgee must retain possession.[2]

[1] In Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441,, an equitable right which was incapable of delivery was pledged by a contract in writing. This transaction was propheld to raise an equitable lien, but it is not accurate to call it a pledge.

In McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543, the court sustained an equitable lien, and said: "We can not consider this agreement as a common law pledge, and void because the policies were not given into the possession of Daskam or the bank. It was not a pledge of marketable security or of salable property."

See also *In re* Elm Brewing Co., 132 Fed. Rep. 299, 12 Am. B. R. 623.

[2] Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 16 Am. B. R. 49; Love v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 16 Am. B. R. 171; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79; reversed for want of jurisdiction *sub nom.;* 1st Nat'l Bank v. Title & Trust Co.,

The manual delivery and possession of the thing pledged is the simplest form. Where bills of exchange, promissory notes, corporate stock, etc., are pledged there should be some evidence thereof by way of endorsement or assignment, without which the pledgee could not recover thereon. They remain the assets of the pledgor and subject to the payment of his debts unless validly transferred. A negotiable instrument payable to bearer may be pledged by delivery only. Where a part of a thing in bulk is pledged, such part must be separated and set apart, unless the pledgee has possession of the whole bulk.[3] If the possession of the whole is in the pledgee, then the part pledged must also be there.

The possession need not be actual. It may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor.[4] Where the debtor executed and delivered to a bank a bill of sale, absolute on its face, of billets of iron, which by reason of their weight and bulk were permitted to remain on the premises of the vendor, the billets however being marked by a sign posted on the several piles setting out that they were the property of the bank, it was held a valid pledge.[5]

A mere contract or agreement to give a pledge is not sufficient to constitute a pledge.[6] Where a creditor takes possession of goods within four months of bankruptcy in pursuance of an agreement made prior to such period, the pledge may

198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Casey v. Schneider, 96 U. S. 496, 24 L. Ed. 790.

[3] Fidelity Ins., etc., Co. v. Roanoke Iron Co., 81 Fed. Rep. 439, 445.

[4] Casey v. Cavaroc, 96 U. S. 467, 477, 24 L. Ed. 779.

[5] 1st Nat'l Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782.

[6] *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388.

But see Wilder v. Watts, 138 Fed. Rep. 427, 15 Am. B. R. 57.

be avoided by the trustee as a preference, because the pledge was made within the prohibited period.[7] But where the agreement, made at the time of the loan, is to pledge a particular thing, which is subsequently delivered to the pledgee, the date of making the pledge relates back to the time of the contract and constitutes a valid pledge which can not be disturbed by a trustee.[8] So renewal notes given within four months secured by the same pledge as the original indebtedness, which was created and the pledge made prior to that period, is not a preference.[9]

The actual possession may be held by a third person for the pledgee. Such person will be considered the pledgee's agent. One chattel may be pledged to secure two debts to two different persons, one holding it as agent for the other to the extent of his debt.[10] A pledge of fire insurance policies has been sustained, where a solvent company placed the policies of insurance upon its mill, warehouse, etc., in the hands of two of its directors, which it agreed should remain in the directors' possession as pledges to secure loans which had been or which might thereafter be made to it by creditors, there being no formal assignment and consent of the insurance company.[11]

When the actual delivery is to a carrier or warehouseman and a bill of lading or warehouse receipt is given therefor, the transfer of the instrument and its delivery to the pledgee is a delivery of possession to the pledgee of the property represented by the instrument.[12] It is a necessary condition of such possession by the pledgee that the property itself be in

[7] *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388.

[8] Wilder v. Watts, 138 Fed. Rep. 427, 15 Am. B. R. 57; Union Trust Co. v. Bulkeley (C. C. A. 6th Cir.), 150 Fed. Rep. ——.

[9] Chatt. Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441.

[10] *In re* Wiley, No. 17654 Fed. Cas., 4 Biss. 71.

[11] Stout v. Yaeger Milling Co., 13 Fed. Rep. 802.

See McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543, where fire insurance policies were not pledged, but enforced as an equitable lien.

[12] Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109.

the possession of some person other than the pledgor.[13] The supreme court has said that "when there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense." [14] A warehousing company has been held to have possession of property pledged where it had it under lock and key in a place to which it had a legal title and right of access by lease from the debtor and no one else could get such access without breaking in, the outside of the depositary being placarded with signs stating in large letters that the premises were occupied by the company as a public warehouse;[15] and also where it had piles of lumber on property leased by it, but not enclosed, the corners of the premises and each pile of lumber placarded and the lumber placed in the custody of an agent, who was stationed in the lumber yard to assert control and prevent others from interfering with the lumber,[16] and also where a warehousing company leased a part of the owner's premises, which was marked off by signboards to indicate the fact and the material for which a warehouse receipt was given being distinguished by stakes, cords and tags and in charge of a warehouse custodian.[17] But where an attempted warehousing of seed on the owner's premises consisted of a lease to the warehouseman, a tagging of the bags of seed without any exterior sign on the premises, the warehouseman having no key to the premises and no custodian to prevent the bankrupt from doing with it as he would, it was held that the possession was not changed from the debtor to the warehouseman.[18]

[13] Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 6 Am. B. R. 49; *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 11 Am. B. R. 79; reversed for want of jurisdiction, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

[14] Mr. Justice Holmes in Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109.

[15] Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109.

[16] Love v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 16 Am. B. R. 171.

[17] Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138.

[18] Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed Rep. 32, 16 Am. B. R. 49.

If the possession be once given up, the pledge, as such, is extinguished.[19] Hence a redelivery of the thing pledged to the debtor ordinarily teminates the pledge. A redelivery for a mere temporary purpose, as for shoeing a horse which had been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the maker, does not amount to an interruption of the pledgee's possession. The owner is but a mere special bailee for the creditor.[20] So when the debtor is employed in the creditor's service his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession of the debtor.[21] When a security is redelivered for the purpose of exchanging it for other security,[22] or where collateral security is transferred by the borrower to the lender for collection, the pledge is not terminated by such redelivery.[23] It has been held that the fact that placards on billets of iron, stored on owner's premises, had fallen off for a period of several months did not end the possession of the pledgee, who replaced them as soon as he knew the fact.[24]

§ 198a. Rights of pledgee and trustee in property pledged.

Where a pledge is valid under the state law and not in violation of any provision of the bankruptcy law it will be respected and may be enforced by a court of bankruptcy.[1] State statutes regulating pledges and warehousemen are controlling

[19] Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

[20] Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

[21] Reeves v. Capper, 5 Bing. N. C. 136.

[22] Hays v. Riddle, 1 Sandf. (N. Y.) 248.

[23] Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.

[24] 1st Nat. Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782.

[1] Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; Wm. Firth Co. v. S. C. L. & T. Co. (C. C. A. 4th Cir.), 122 Fed. Rep. 569; *In re* Waterloo Organ Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 345, 13 Am. B. R. 477; Love v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 16 Am. B. R. 171; 1st Nat. Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589.

in a court of bankruptcy in determining the validity and effect of pledges.[2]

In case one pledgee holds two separate pledges for two separate debts and it turns out that the security for one debt is too small and there is a surplus from the other pledge, the pledgee can not apply the surplus to the payment of the deficiency in the absence of a special contract that the security stand for both debts. The reason for this is that the surplus is a trust fund in possession of the pledgee and not a debt. It can not therefore be set off against the debt.

A stockbroker who purchases and carries stocks on account of a customer on margins furnished by such customer holds the same as pledgee, and on his bankruptcy the customer is entitled to the stock on payment of the amount due thereon, or to the surplus realized from its sale by the trustee, to the exclusion of the bankrupt's creditors.[3]

The trustee may redeem property pledged, under the direction of the court, by tendering performance of the contract of pledge or discharging the debt for which the property is held.[4] This will be done only where the property is considered of greater value than the debt. The trustee of an estate of a bankrupt, who has repledged property held by him as a pledge, may redeem the property for the estate of the bankrupt by paying the bankrupt's debt. He takes it subject to the right of the original owner to redeem, because he has only the bankrupt's interest, which is that of pledgee.

The trustee may sell the interest of the bankrupt in the property pledged by direction of the court without making the pledgee a party.[5] In such case the property conveyed subject to the claim of the pledgee.

[2] Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32; 16 Am. B. R. 49; Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; Adams v. Merchants' Nat. Bank, 2 Fed. Rep. 174; Casey v. Schneider, 96 U. S. 496, 24 L. Ed. 790; Hardeman v. Etheridge (C. C. A. 5th Cir.), 112 Fed. Rep. 619.

[3] *In re* Bolling, 147 Fed. Rep. 786.

[4] Yeatman v. Savings Institution, 95 U. S. 764, 768; 24 L. Ed. 589.

[5] Yeatman v. Savings Institution, 95 U. S. 764, 768; 24 L. Ed. 589.

The trustee may, under order of court, sell the property free from the lien of the pledgee. The trustee can not compel a sale of this character without the consent of the pledgee, because the property is in the possession of the pledgee and the statute does not provide for bringing in parties to determine controversies of this kind, where the property is not in the custody of the court. The pledgee may consent. In that case proceedings to sell property may be instituted by a petition by the trustee for leave to sell the pledge at private or public sale, the pledgee consenting. The fund will stand for the property. A rule to show cause why the sale should not be had is issued by the court to the creditors, giving them ten days' notice of the hearing. An order directing the trustee to make such sale is then entered and the sale made by the trustee cooperating with the pledgee. The sale is then confirmed by the court and the money distributed as in other cases.

The pledgee may proceed upon default to sell the pledge in the usual way, although the pledgor may have been adjudged a bankrupt,[6] and the court will not interfere with a pledgee selling a thing pledged, under the power of sale given by the terms of his contract, when there is no claim that such power is exercised in a fraudulent or oppressive manner.[7] Notice of such sale should ordinarily be given to the trustee, provided he has been appointed before the sale. The pledgee may rely wholly upon his security and refuse to prove his claim in the bankruptcy court. In such a case he loses only the privilege in participating in the distribution of the bankrupt's estate. He may surrender his preference and prove his claim as an unsecured creditor.[8]

Where the pledge is in fraud of the bankrupt law it is void, and the trustee may disregard the contract of pledge and

[6] Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136; *In re* Browne, 104 Fed. Rep. 762, 5 Am. B. R. 220; *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 819, 15 Am. B. R. 362.

[7] *In re* Browne, 104 Fed. Rep. 762, 5 Am. B. R. 220; *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 15 Am. B. R. 362; reversing 134 Fed. Rep. 101, 14 Am. B. R. 226.

[8] B. A. 1898, Sec. 57*g*.

recover the property for the benefit of the creditors. In order to constitute a preferential pledge under Section 60 it must have been, *first,* pledged by an insolvent person to a creditor, and, *second,* with the effect to enable the creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, and, *third,* such creditor must have had reasonable cause to believe that it was intended to give him a preference, and, *fourth,* the pledge must have been within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudication.[9] If the effect of the transaction is not to give a pledge, the creditor stands as a common instead of a preferred creditor of the bankrupt's estate.[10]

§ 199. As to liens generally.

The bankrupt law recognizes and preserves liens given or accepted in good faith, and not in contemplation of, or in fraud upon the act, and for a present consideration which has been recorded according to law, if record thereof is necessary to impart notice.[1]

In order that a lien be valid under the bankrupt act it is

[9] For further consideration of these elements consult Preferences by transfer, Sec. 194 *et seq.* For examples of invalid pledges, see Ogden v. Jackson, 1 Johns (N. Y.) 370; Adams v. Nat. Bank, 2 Fed. Rep. 174; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 16 Am. B. R. 49; *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

[10] Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Adams v. National Bank, 2 Fed. Rep. 174.

[1] B. A. 1898, Sec. 67*d*; *In re* Lillington Lumber Co., 132 Fed. Rep. 886, 13 Am. B. R. 153; *In re* Standard Laundry Co., 112 Fed. Rep. 126, 7 Am. B. R. 254; Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441; McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543; First National Bank v. Pa. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 10 Am. B. R. 782; *In re* Hanna, 105 Fed. Rep. 587, 5 Am. B. R. 127; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744; *In re* Nicholas, 122 Fed. Rep. 299, 10 Am. B. R. 291; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

necessary that, *first*, it should have been given or accepted in good faith and for a present consideration, and, *second*, that it should have been recorded if the local law requires record to impart notice. There is no four months' limitation to liens created other than by transferring property or through legal proceedings. But claims which, for want of record,[2] or for other reasons, would not have been valid liens as against the claims of the creditor of the bankrupt, are not liens against his estate.[3]

Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.[4]

Liens may be divided into three classes.

First. Common law or retaining liens, such as the lien of tradesmen upon the specific goods in their hands, for their labor and expense in improving or altering them;[5] livery-stable keepers, for care and keep of horses;[6] common carriers of goods, for their services and expenditure with reference to carriage of goods,[7] or inn-keepers, upon the luggage, car-

[2] Bank v. Herbert, 8 Cranch, 36, 3 L. Ed. 479; *In re* Brunquest, No. 2055 Fed. Cas., 7 Biss. 208. See Sec. 197*d*, *ante*.

[3] B. A. 1898, Sec. 67*a*; Spencer v. Duplan Silk Co., 112 Fed. Rep. 638, 7 Am. B. R. 563; *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302; *In re* Andrae Co., 117 Fed. Rep. 561, 9 Am. B. R. 135.

[4] B. A. 1898, Secs. 67*b* and 67*f*; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* N. Y. Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; Patten v. Carley (Sup. Ct. N. Y. App. Div.), 8 Am. B. R. 482.

[5] *Ex parte* Deeze, 1 Atk. 228; Franklin v. Hosier, 4 B. & Ald. 341.

[6] Jackson v. Cummins, 5 M. & W. 342; Judson v. Etheridge, 1 Cr. & M. 743.

[7] Aspinwall v. Pickford, 3 B. & P. 44 n.; Rushforth v. Hadfield, 6 East. 519; Wright v. Snell, 5 B. & Ald. 350.

riage or horses of a guest, for debts incurred while in their keeping,[8] etc., etc.

Second. Liens created by statute, such as mechanics' liens, which will be further considered hereafter.[9]

Third. Equitable liens. The term "lien" is especially applicable to the common law lien, but it has by analogy been applied to other cases where a right to prepayment exists out of the particular property, or a particular estate or interest in property, either by contract express or implied by the implication of a trust or statute, although the property itself may not be in the possession of or vested in the person claiming the lien.[10]

Liens of this description are in the nature of equitable charges. Mortgages which have already been considered[11] may also be regarded as equitable liens, but for convenience they have been classed under the head of mortgages. A familiar example of an equitable lien is that of a vendor for the purchase money[12] and that of a judgment creditor.

It has been held that a vendee under a contract for the sale of land who has recorded a bond for the deed and paid the purchase money is entitled to prove his claim as one secured by an equitable lien on the land, which had not been transferred by the vendor to him prior to the bankruptcy of the vendor,[13] and where a landlord had made an equitable assignment of the rents *pro tanto* which had come into the hands of the

[8] Mulliner v. Florence, 3 Q. B. Div. 484; Turrill v. Crawley, 13 Ad. and El. (N. S.) 197.

[9] Sec. 200, *et seq.*

[10] *In re* Chatt. Nat. Bank, 102 Fed. Rep. 755, 4 Am. B. R. 441; McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 8 Am. B. R. 543; Elm Brewing Co., 132 Fed. Rep. 299, 12 Am. B. R. 623; 3 Pomeroy Eq. Jur., Sec. 1235; Walker v. Brown, 165 U. S. 654, 41 L. Ed. 865.

[11] Sec. 197, *et seq.*, *ante.*

[12] *In re* Portuondo Co., 135 Fed. Rep. 592, 14 Am. B. R. 337; *In re* Bryan, No. 2062 Fed. Cas., 3 N. B. R. 110; Hall v. Scovel, No. 5945 Fed. Cas., 10 N. B. R. 295; *In re* Brooks, No. 1943 Fed. Cas., 2 N. B. R. 466; *In re* Perdue, No. 10975 Fed. Cas., 2 N. B. R. 183; *In re* Hutto, No. 6960 Fed. Cas., 3 N. B. R. 787.

[13] *In re* Peasley, 137 Fed. Rep. 190, 14 Am. B. R. 496.

trustee that it created a lien on the fund in the hands of the trustee.[14]

Where a valid lien exists the lien-holder has the same courses open to him as any other secured creditor.[15] The court of bankruptcy may authorize the trustee to redeem the property and discharge the lien, or it may order the entire property to be sold and ascertain the amount of the debt secured by the lien In such case the debt will be preferred in the distribution of the proceeds and the purchaser of the estate will take it discharged of all incumbrances. Or, on the other hand, the court may allow the trustee to sell the property subject to the lien on the bankrupt's estate, to be finally settled without any determination of the rights claimed under the lien. In such case the petitioner will retain those rights as against the purchaser of the property. If his lien is not sufficient to secure the whole debt he may prove the balance of such claim over the value of such lien, but for only such excess.[16]

§ 200. Mechanics' liens.

A mechanic's lien is created by a state statute. It gives a lien to material men and laborers upon specific property for the payment for materials furnished for and labor performed on that property.

What constitutes a valid mechanic's lien, when it attaches, and what is necessary to be done in order to complete and preserve the lien, varies in different states. Whether a mechanic's lien is a valid claim against the estate of the bankrupt depends upon the local law as construed by the highest court of the state.[1] If a valid lien has attached under the state law before proceedings in bankruptcy have been commenced the lien will be respected by the court of bankruptcy.[1] But if for want of record or for other reasons it would

[14] *In re* Oliver, 132 Fed. Rep. 588, 12 Am. B. R. 694.

[15] Sec. 202, *post.*

[16] B. A. 1898, Sec. 56*b*.

[1] *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508; *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 4 Am. B.

not have been a valid lien as against the claims of the creditors of the bankrupt, it is not a lien against his estate.[2] Where a mechanic's lien is valid as against a debtor or his general assignee under the state law when notice of lien is recorded after bankruptcy, it is valid as against his trustee in bankruptcy,[3] and a suit in a state court to enforce the lien will not be stayed by a court of bankruptcy.[4]

The adoption of the state statutes with reference to liens is constitutional.[5] The uniformity required by the constitution relates to national legislation only, and therefore the laws of the several states may be left in force, and to such an extent as congress may see fit.

Where the trustee delays in electing to take the property subject to the lien, the holder of such lien may bring a suit in the proper state court to foreclose it.[6] The reason for this is, that if the court of bankruptcy should abstain from ascertaining the lien, and from providing for its satisfaction out of the property or proceeds of a sale thereof, the lien

R. 126; *In re* Kerby-Dennis Co. (C. C. A. 7th Cir.), 95 Fed. 116, 2 Am. B. R. 402; *In re* Coe-Powers Co. (C. C. A. 6th Cir.), 109 Fed. 550, 6 Am. B. R. 1; *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re* West Norfolk Lumber Co., 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re* Georgia Handle Co. (C. C. A. 5th Cir.), 109 Fed. Rep. 632, 6 Am. B. R. 472; South End Imp. Co. v. Harden (N. J.), 52 Atl. 1127.

[2] B. A. 1898, Sec. 67*a*.

In re Brunquest, No. 2055 Fed. Cas., 7 Biss. 208; Bank v. Herbert, 8 Cranch, 36.

[3] *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508; overruling *In re* Roeber (C. C. A. 2d Cir.), 121 Fed. Rep. 449, 9 Am. B. R. 303; Mott v. Wissler Mining Co. (C. C. A. 4th Cir.), 135 Fed. Rep. 697, 14 Am. B. R. 321; *In re* West Norfolk Lumber Co., 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re* Lillington Lumber Co., 132 Fed. Rep. 886, 13 Am. B. R. 153.

[4] *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508.

[5] Darling v. Berry, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed. Cas., 1 Dill. 45; *In re* Jordon, No. 7514 Fed. Cas., 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., 10 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., 2 Hughes, 322.

[6] Marston v. Stickney, 55 N. H. 383; Clifton v. Foster, 103 Mass. 233; Bryant v. Small, 35 Wis. 205; Douglass v. Zinc Co., 56 Mo. 388; Keller v. Denmead, 68 Penn. St. 449.

might be lost under the state law.[7] Nearly every state, which has a mechanic's lien law, has provided for bringing a suit to enforce the lien within a limited time or the lien is lost.[8] The trustee in bankruptcy, if one has been appointed, should be made a party to such suit. If the trustee does not appear to contest either the suit or the lien, the lien may be foreclosed and the property sold. If he does appear to contest the suit the state court will ordinarily continue the case to await the action of the bankruptcy court. The lien is preserved by the bringing of the suit in the state court.

The jurisdiction of the court of bankruptcy is sufficient to enforce a mechanic's lien in that court, without any petition being filed or suit instituted in the state court to preserve and continue it, provided the bankruptcy court has lawful custody of the property to which the lien is claimed.[9] Before beginning a suit in the state court, if bankruptcy proceedings have been commenced, no application need be made to the bankruptcy court for leave to foreclose the lien in the state court.[10]

§ 201. Admiralty liens.

There is a class of maritime liens for materials and supplies furnished to vessels. Where such a lien exists a court of bankruptcy will enforce it with the same effect as it would have in admiralty.[1] A court of bankruptcy will also enforce

[7] In Bryant v. Small, 35 Wis. 209, the court said: "This court has held that the lien exists by virtue of the statute. . . . But, nevertheless, the party must file his petition and commence his action within the period described to enforce it, or it will be lost." This is the usual rule in this respect.

[8] Bryant v. Small, 35 Wis. 205; Clifton v. Foster, 103 Mass. 233.

[9] B. A. Sec. 2; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; South End Imp. Co. v. Harden (N. J.), 52 Atl. 1127; *In re* Lemmon & Gale Co. (C. C. A. 6th Cir.), 112 Fed. Rep. 296, 7 Am. B. R. 291; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623.

[10] *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508.

[1] The Ironsides, No. 7069 Fed. Cas., 4 Biss. 518; *In re* Scott, No. 12517 Fed. Cas., 1 Abb. U. S. 336; *In re* Kirkland, No. 7842 Fed. Cas., 12 Am. Law Reg. 300.

a lien for supplies and materials furnished to a vessel, founded upon a state statute, and not of a strictly maritime character.[2]

§ 202. Rights of a secured creditor.

A "secured creditor" is a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under the bankrupt act, or who owns such a debt for which some endorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets.[1] A creditor, whose debt is secured by the property or sole obligation of a person other than the bankrupt, is not a "secured creditor" within the meaning of the bankrupt act.[2]

Where a creditor has received security for his debts valid under the bankrupt act, three courses are open to him, provided the trustee does not elect to redeem by paying the debt or to take the property as assets of the bankrupt, subject to the security. They are:

First. The secured creditor may rely upon his lien and neither prove his debt in bankruptcy nor release his security. In such case the security is preserved, notwithstanding the bankruptcy of the debtor.[3]

Second. The secured creditor may rely upon his security and prove for such sum as may be owing above the value of his security.[4] The value of securities held by secured creditors is determined by converting the same into money, ac-

[2] *In re* Scott, No. 12517 Fed. Cas., 1 Abb. U. S. 336. This principle is also recognized in The Edith, 94 U. S. 518, 24 L. Ed. 167; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Leon v. Galceran, 11 Wall. 185, 20 L. Ed. 74.

[1] B. A. 1898, Sec. 1, clause 23.

[2] Gorman v. Wright (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 14 Am. B. R. 135; *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 15 Am. B. R. 362.

[3] Long v. Bullard, 117 U. S. 617, 29 L. Ed. 1004; Dudley v. Easton, 104 U. S. 103, 26 L. Ed. 668; McHenry v. La Societe Francaise, 95 U. S. 58, 24 L. Ed. 370; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re* Grissler (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 13 Am. B. R. 508.

[4] B. A. 1898, Sec. 56*b* and Sec. 57*e*. Official Form No. 32, Form No. 55, *post*.

cording to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value credited upon such claims, and a dividend paid only on the unpaid balance.[5]

Third. A secured creditor may surrender his security and then prove his debt as an unsecured creditor.[6] In 1813 Lord Eldon said:[7] "The practice has been long established in bankruptcy not to suffer a creditor holding a security to prove, unless he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious; till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and with this further consideration that, in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his title in a situation of predominate advantage." The bankruptcy act of 1867[8] expressly provided for the application of the rule, as does the present English bankruptcy act.[9]

The trustee may, however, elect to take the property of the bankrupt subject to the valid liens of creditors.[10] In such case the court may, in its discretion, order the property sold, subject to the lien or free from the lien.[11] If it is sold subject to

[5] B. A. 1898, Sec. 57*h*.

[6] *In re* Conner, No. 3118 Fed. Cas., 1 Low. 532; *In re* Kipp, No. 7836 Fed. Cas., 4 N. B. R. 593; *In re* Leland, No. 8230 Fed. Cas., 7 Ben. 156; *In re* Stephens, No. 13365 Fed. Cas., 3 Biss. 187; *In re* Evans, No. 4552 Fed. Cas., 3 N. B. R. 261.

[7] In *Ex parte* Smith, 2 Rose 64. "In Cooke's Bankrupt Laws the rule in bankruptcy is attributed to legislative enactment, and is thus stated: 'The aim of the legislatures in all the statutes concerning bankrupts being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally.'" Lord Coltenham, in Mason v. Bogg, 2 Myl. & Cr. 446.

[8] R. S. Sec. 5084.

[9] Act of 1883, 46 and 47 Vict. c. 52, Sec. 39, clauses 9 to 16.

[10] See Title to bankrupt's property, Sec. 149, *ante*; Gibson v. Warden, 14 Wall. 244, 20 L. Ed. 797; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

[11] Houston v. City Bank, 6 How. 486, 12 L. Ed. 526; Fowler v. Hart, 13 How. 373, 14 L. Ed. 186; *In re*

the lien the creditor still has his claim preserved against the new purchaser. If it is sold free of the lien he has his claim preserved against the proceeds of the sale for the amount of his debt. The trustee is authorized to convey property to the purchaser.[12]

A secured creditor may come into a court of bankruptcy and petition it to enforce his security against the bankrupt's estate, in case the trustee does not elect to sell the property either subject to or free from liens. But such creditor can not compel a court of bankruptcy to do this as a matter of right.[13] It is sometimes desirable and convenient to pursue this course and the court has ample power to enforce such security, preserving to the secured creditor all of his rights arising therefrom.[14] Where a secured creditor has availed himself of the bankruptcy court and its process to collect his claim it is only right that he bear his share of the cost of such proceeding.[15] The referee and trustee are entitled to commissions on all moneys disbursed to such creditor by the trustee.[16]

§ 203. Suits to set aside fraudulent conveyances and preferences—Jurisdiction, etc.

The trustee is authorized to sue for and recover that which was conveyed in fraud of the rights of creditors or its value.[1]

Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Styer, 3 Am. B. R. 424, 98 Fed. Rep. 290; *In re* Gerry, 112 Fed. Rep. 957, 7 Am. B. R. 461; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117. See Secs. 256 and 257, *post.*

[12] B. A. 1898, Sec. 70*c*.

[13] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

[14] See Sec. 257, *post.*

[15] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

[16] B. A. 1898, Secs. 40 and 48, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

[1] B. A. 1898, Secs. 67*e* and 70*e*; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669; Gregory v. Atkinson, 127 Fed. Rep. 183, 11 Am. B. R. 495; McNulty v. Feingold, 129 Fed. Rep.

It makes no difference whether the conveyance is constructively fraudulent under a statute of frauds or under a special provision of the bankrupt law.[1] The trustee is also authorized to set aside all fraudulent preferences which creditors have received and to recover the property or its value from such persons.[2]

The trustee must bring the suit.[3] It can not be maintained by a creditor.[4]

Whom the Trustee Represents.—For most purposes the trustee represents the bankrupt, but in respect to suits to avoid fraudulent preferences and conveyances he represents the general or unsecured creditors. In such cases he has all the rights of a judgment creditor, as well as the powers specifically conferred by the bankrupt act.[5] Hence, what would have been an invalid conveyance or preference at the suit of a creditor is voidable as against the trustee.[5] In cases of this nature the trustee has nothing to do with the disputes of secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate or to determine whether there is an excess of property over what is required for the purposes of the secu-

1001, 12 Am. B. R. 338; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101; Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297.

[2] B. A. Sec. 60b; *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101.

[3] Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U. S. 25, 24 L. Ed. 43; Allen & Co. v. Montgomery, 48 Miss. 101; *In re* Meyers, No. 9518 Fed. Cas., 2 Ben. 424; *In re* Gray, 47 App. Div. (N. Y.) 554, 3 Am. B. R. 647; Falco v. Kaupisch Creamery Co. (Ore.), 70 Pac. R. 286; Thompson v. First National Bank, 84 Miss. 54.

[4] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; King v. Dietz, 12 Penn. St. 156; Lane v. Nickerson, 99 Ill. 284; Lessure v. Weaver, 108 Ill. App. 616.

[5] Dudley v. Easton, 104 U. S. 103, 26 L. Ed. 688; Mueller v. Bruss, 112 Wis. 406, 8 Am. B. R. 442; Andrews v. Mather, 134 Ala. 358, 9 Am. B. R. 296; Beasley v. Coggins, 48 Fla. 215, 12 Am. B. R. 355, 37 So. Rep. 213; Sheldon v. Parker, 66 Neb. 610, 630, 11 Am. B. R. 152, 169; Hood v. Blair St. Bank, 91 N. W. R. 701.

In First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639, the supreme court said: "The rule that the trustee takes

rity.[6] The trustee's duties in this respect relate chiefly to the interests of the general creditors.

The bankrupt act provides that, in case it is for the benefit of the general estate, the trustee may be subrogated to the rights of a particular creditor for the benefit of all the creditors. Thus, whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.[7]

So also a preference created by a levy, judgment, attachment or other lien obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him is ordinarily null and void. But the court may, upon notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate.[8]

It will be observed that neither of the provisions referred to above militate against, but especially protect, a *bona fide* purchaser for a fair present consideration, and also a creditor who has honestly received a preference, which is valid under the act. The right of action to recover property by a trustee lies against the creditor, who received the preference or fraudulent transfer.[9] A trustee can not reach third parties to whom

the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens, which although valid as to the bankrupt, are invalid as to creditors.

[6] McHenry v. La Societe Francaise, 95 U. S. 58, 24 L. Ed. 370; Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668.

[7] B. A. 1898, Sec. 67*b*; *In re* Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 6 Am. B. R. 615; *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[8] B. A. 1898, Secs. 67 *c* and *f*; First National Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

[9] Hackney v. First Nat. Bank, 68 Neb. 594; Bush v. Export Storage Co., 136 Fed. Rep. 914, 14 Am. B. R. 138.

money may have been paid or property transferred in good faith for a valuable consideration by such creditor. But where property is fraudulently transferred by a debtor his trustee may recover it in the hands of one having notice of the fraud.

In What Court such Proceedings may be Instituted. —A difference of opinion existed for some time with reference to the extent of the jurisdiction of a court of bankruptcy over suits to recover fraudulent conveyances and preferences. The question was finally settled by the supreme court, which held that a court of bankruptcy had no jurisdiction, without the proposed defendant's consent, to entertain proceedings to recover property conveyed to the defendant by the bankrupt in fraud of the bankruptcy act.[10]

By the amendment of Feb. 5, 1903, jurisdiction was conferred upon the courts of bankruptcy of suits for the recovery of property under Sec. 60*b*, Sec. 67*e* and Sec. 70*e*.[11] In respect to this class of suits the courts of bankruptcy and the state courts now have concurrent jurisdiction. It has been held that this is true even where adjudication of bankruptcy was before the passage of the amendment of Feb. 5, 1903, authorizing such suits to be brought in courts of bankruptcy.[12]

Section 23*b* was amended by the Act of 1903, by adding the words "except suits for the recovery of property under Sec. 60*b* and Sec. 67*e*," making no reference to Sec. 70*e*. It has been held that congress intended thereby to confer jurisdiction on the bankruptcy courts, irrespective of the consent of the defendant, of suits to recover preferences under

[10] Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182, 4 Am. B. R. 177; Hicks v. Knost, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; Wall v. Cox, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727.

[11] 32 Stat. at L. 797. Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101; *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; McNulty v. Feingold, 129 Fed. Rep. 1001, 12 Am. B. R. 338; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669.

[12] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992; *In re* Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381

But see *In re* Hartman, 121 Fed. Rep. 940, 10 Am. B. R. 387.

Sec. 60*b* and fraudulent transfers made within four months of bankruptcy under Sec. 67*e*, but that the consent of the defendant is requisite in a suit under Sec. 70*e* to recover fraudulent transfers made more than four months prior to bankruptcy.[13]

It is sometimes the case that the court of bankruptcy in which the original proceedings are pending can not obtain jurisdiction of the person and subject-matter for the reason that it is beyond the reach of its process. In such cases it is necessary to go into a court which has jurisdiction. The trustee may maintain such a suit in a court of bankruptcy in a district other than that in which the decree of bankruptcy was made.[14] A bill or petition for this purpose should show what proceedings have taken place in the principal court with reference to the commencement of the proceedings and the adjudication of bankruptcy, etc. Suits of this character are not dependent upon the citizenship of the parties.

Suits to avoid a preference or conveyance may be maintained in the circuit courts of the United States only when they fall within the provisions of Section 23 with reference to citizenship and the amount involved. Under the act of 1867 such suits might be prosecuted, irrespective of the citizenship of the parties, on the ground that a federal question was involved.[15] But the rule is clearly changed by the provisions of Section 23.[16] A simple contract creditor can not

[13] Gregory v. Atkinson, 127 Fed. Rep. 183, 11 Am. B. R. 495.

[14] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Peiser, 115 Fed. Rep. 199, 7 Am. B. R. 690; Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Sherman v. Bingham, No. 12762 Fed. Cas., 3 Clif. 552; *Ex parte* Martin, No. 9149 Fed. Cas., 5 Law Rep. 158. See also ancillary jurisdiction, Sec. 21, *ante*.

[15] Smith v. Mason, 14 Wall, 419, 20 L. Ed. 748; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Lathrop v. Drake, 91 U. S. 516, 23 L. Ed. 414; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Burbank v. Bigelow, 92 U. S. 179, 23 L. Ed. 542; Dudley v. Easton, 104 U. S. 103, 26 L. Ed. 668; Sec. 25, *ante*.

[16] Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

maintain a suit in a circuit court to set aside a fraudulent conveyance under Section 23 of the bankrupt act.[17]

§ 203a. Pleading and practice in suits to recover property.

To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy.[1] For this purpose there must be a plenary suit at law or in equity according to the nature of the case.[2] Such suits may be actions at law in ejectment, trover, assumpsit, etc., or suits in equity, as a bill to set aside a fraudulent conveyance, etc.[3] What kind of a suit will lie to recover property for the estate of a bankrupt depends upon the law governing the practice in the particular court in which the suit is brought. It has been held that an action for assumpsit will not lie, but that the action should be one of trover.[4]

It is not necessary for a trustee to obtain a judgment and have execution returned *nulla bona,* before he can resort to a court of equity to recover a preference or set aside a fraudulent conveyance.[5] The supreme court has said "as to such

[17] Viquesney v. Allen (C. C. A. 4th Cir.), 131 Fed. Rep. 21, 12 Am. B. R. 402.

[1] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992; Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 13 Am. B. R. 338.

[2] *In re* Knickerbocker, 121 Fed. Rep. 1004, 10 Am. B. R. 381; Louisville Trust Co. v. Cominger, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; Parker v. Black, 143 Fed. Rep. 560, 16 Am. B. R. 202.

[3] Pond v. N. Y. Exchange Bank, 10 Am. B. R. 343, 124 Fed. Rep. 992; Wall v. Cox, 101 Fed. Rep. 403, 4 Am. B. R. 659; reversed on another point, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727; Parker v. Black, 143 Fed. Rep. 560, 16 Am. B. R. 202.

[4] Lyon v. Clark, 129 Mich. 381; Weeks v. Fowler (N. H.), 53 Atl. Rep. 543. But see *In re* Reynolds, 133 Fed. Rep. 584, 13 Am. B. R. 245.

[5] Mueller v. Bruss, 112 Wis. 406, 8 Am. B. R. 442; Andrews v. Mather, 134 Ala. 358, 9 Am. B. R. 296; Beasley v. Coggins, 48 Fla. 215, 12 Am. B. R. 355, 37 So. Rep. 213; Sheldon v. Parker, 66 Neb. 610, 613, 11 Am. B. R. 152, 169; Hood v. Blair State Bank, (Neb.) 91 N. W. R. 701; Mitchell v. Mitchell, 147 Fed. Rep. 280.

See also McNulty v. Feingold, 129 Fed. Rep. 1001, 12 Am. B. R. 338; Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500; Wall v. Cox, 101 Fed. Rep. 403, 4 Am.

preferences and conveyances he has all the right of a judgment creditor as well as the power specifically conferred by the bankruptcy act." [6]

Where resort is had to a suit in equity in a court of bankruptcy, that court has the powers usually vested in courts of equity. It may grant an injunction to prevent the defendant from disposing of the property sought to be recovered,[7] or a writ of sequestration to prevent its removal from the district,[8] or it may appoint a receiver to take custody of the property.

The suit must be prosecuted by the trustee.[9] It can not be maintained by a creditor.[10] It is not necessary for the trustee to obtain leave of the court of bankruptcy to bring the suit.[11] No previous demand is required in suits of this character.[12] The commencement is itself a demand.

A court of bankruptcy or a circuit court of the United States will not ordinarily require security for costs of a trustee, but may do so in its discretion.[13]

B. R. 659, reversed for want of Federal jurisdiction, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727; Off v. Hakes (C. C. A. 7th Cir.), 142 Fed. Rep. 364, 15 Am. B. R. 696.

[6] Mr. Justice Waite, in Dudley v. Easton, 104 U. S. 99, 103, 26 L. Ed. 668.

[7] Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269; Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 293.

[8] Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101.

[9] Trimble v. Woodhead, 102 U. S. 647, 26 L. Ed. 290; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Thompson v. 1st Nat. Bank, 84 Miss. 54; *In re* Gray, 47 N. Y. Supr. Ct. App. Div. 554; 3 Am. B. R. 647; Allen & Co. v. Montgomery, 48 Miss. 101; Barker v. Franklin, 75 N. Y. Supp. 305, 8 Am. B. R. 468.

[10] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394; Glenny v. Langdon, 98 U. S. 20, 25 L. Ed. 43; Leseure v. Weaver, 108 Ill. App. 616; King v. Dietz, 12 Pa. St. 156; Lane v. Nickerson, 99 Ill. 284.

[11] Callahan v. Israel, 186 Mass. 383; Chism v. Citizens' Bank, 77 Miss. 599; Chism v. Bank of Friar's Point (Supr. Ct. of Miss.), 5 Am. B. R. 56.

See also the observations of Judge Hammond, *In re* Baber, 119 Fed. Rep. 520, 9 Am. B. R. 406.

[12] Kaufman v. Tredway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669.

[13] *In re* Barrett, 132 Fed. Rep. 362, 12 Am. B. R. 626.

A judgment of a state court determining the same issues may be pleaded in bar of a suit by the trustee in a court of bankruptcy.[14] But the right of a trustee to maintain a suit to recover a preference is not barred by his failure to contest the claim presented by the preferred creditor against the bankrupt's estate.[15] The reason is that a suit by the trustee against a creditor to recover property belonging to the bankrupt's estate presents a different cause of action from a demand by that creditor against the bankrupt's estate, and hence is not *res judicata*. Such suits must be brought within two years after the estate has been closed.[16] A court of bankruptcy may in its discretion reopen the estate of a bankrupt to permit the trustee to maintain an action to recover property.[17] An action by a trustee in a state court may be barred by the state statute of limitations.[18]

The defendant in a suit to recover property by a trustee should be the creditor, who has received the property by way of preference or fraudulent conveyance, or any person receiving it from him with knowledge of the fraud.[19] Where the property has been transferred by such creditor to a *bona fide* purchaser for a consideration, the trustee can not recover the specific property.[20] His remedy is a suit for the value only from the creditor or any person holding it with notice of the fraud.[20] The bankrupt is not a necessary party to a suit to set aside a fraudulent conveyance or recover property as a preference.[21]

[14] *In re* Reynolds, 133 Fed. Rep. 585, 13 Am. B. R. 244.

[15] Buder v. Columbia Dist. Co., 96 Mo. App. 558, 9 Am. B. R. 331.

[16] B. A. 1898, Sec. 11*d*.

[17] *In re* Goldman (C. C. A. 2d Cir.), 129 Fed. Rep. 212, 11 Am. B. R. 707; *In re* Paine, 127 Fed. Rep. 246, 11 Am. B. R. 351.

[18] Harrod v. Farrer, 68 Kan. 153.

[19] Hackney v. 1st Nat. Bank, 68 Neb. 594; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138; Walbrun v. Babbitt, 16 Wall. 577, 21 L. Ed. 489. See Bryan v. Bernheimer, 181 U. S. 188, 197, 45 L. Ed. 814, 5 Am. B. R. 523.

[20] B. A. 1898, Sec. 67*f* and 67*e*. Hackney v. 1st Nat. Bank, 68 Neb. 594; Bush v. Export Storage Co., 136 Fed. Rep. 918, 14 Am. B. R. 138.

[21] Cox v. Wall, 99 Fed. Rep. 546, 3 Am. B. R. 664; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381.

But see Carter v. Hobbs, 92 Fed. Rep. 594, 1 Am. B. R. 215.

The trustee may bring an independent suit in any court, state or federal, having jurisdiction, or file an intervening petition in the bankruptcy proceedings for the recovery of property for the estate.[22] An intervening petition should be filed with the clerk and not with the referee.[23] Whatever method is adopted the defendant must be brought in by service of summons, unless he voluntarily appears and pleads. There is some doubt as to the power of a court of bankruptcy to compel a defendant to answer a suit to recover a fraudulent conveyance under Section 70*e*.[24] Such courts have ample power to do this in suits to recover preferences under Section 60*b* and fraudulent conveyances under Section 67*e*.[25] In case the property is within the jurisdiction of the federal court and the defendant is a non-resident of the district, he may be brought in by an order and service by publication.[26]

In a suit to set aside a preference or fraudulent conveyance it is not necessary to allege the citizenship of the parties where the suit is brought in a court of bankruptcy or in a state court.[27] If the suit is brought in a circuit court of the United States it is necessary to show that diverse citizenship exists between the bankrupt and the creditor and that the amount in controversy exceeds the sum of two thousand dollars exclusive of costs and interest.[28] The citizenship of the trustee is immaterial in that court.[29]

[22] See Sec. 203, *ante*.

[23] *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209, a petition filed with referee was sustained although irregular.

[24] Gregory v. Atkinson, 127 Fed. Rep. 183, 11 Am. B. R. 495.

[25] B. A. 1898, Sec. 23*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Noel, 137 Fed. Rep. 694, 14 Am. B. R. 715; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101; Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669.

[26] R. S. Sec. 738, as amended by the act of March 3, 1875, Sec. 8, 18 Stat. at L. 470, and preserved by act of March 3, 1888, Sec. 6, 25 Stat. at L. 433; Horskins v. Sanderson, 132 Fed. Rep. 415, 13 Am. B. R. 101.

See Loveland's Forms of Fed. Prac., Nos. 63 to 69.

[27] Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500.

[28] B. A. 1898, Sec. 23*a*. Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

[29] Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

A suit to set aside a preference and recover the property for the estate under Section 60*b* is different from a suit to set aside a fraudulent conveyance under Section 67*e* and Section 70*e*. In the first case there need be no actual fraud involved in the transaction. It is fraudulent because the statute makes it so. A suit under the last two sections is founded upon actual fraud. A bill, which stated one transaction and alleged it to be either a preference or a fraudulent conveyance and sought to have it set aside, was held not to state two inconsistent causes of action for equitable relief.[30]

In a suit to recover a preference the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication and his appointment and qualification as trustee of the estate of the bankrupt. He should also allege and prove all the statutory elements constituting a preference, and that the person receiving it, or his agent, had a reasonable cause to believe that it was intended to be a preference;[31] that is to say, he must aver, *first,* the insolvency of the debtor at the time the judgment was entered or the transfer made in favor of the creditor;[32] *second,* that this was done within four months of bankruptcy;[33] *third,* that the effect of which was that the defendant obtained a greater percentage of his debt than any other creditor of the bankrupt of the same class;[34] and *fourth,* that the defendant or his agent[35] had reasonable grounds to believe that it was intended by such transfer of property (or judgment) to give a preference to the defendant within the meaning of the acts of Congress relat-

[30] Wright v. Skinner, 136 Fed. Rep. 694, 14 Am. B. R. 500.

[31] B. A. 1898, Secs. 60*a* and 60*b*. See Secs. 194 *et seq.*, *ante*, where these elements are considered. For Form of Petition, see Form No. 34*a*, *post*.

[32] See Sec. 194*a*, *ante*. Martin v. Bigelow, 36 Misc. Rep. (N. Y.) 298 7 Am. B. R. 218; Chism v. Bank of Friar's Point (Sup. Ct. Miss.), 5 Am. B. R. 56; Deland v. Miller & Chaney Bank (Ia.), 93 N. W. Rep. 304; Severin v. Robinson (Ind. App.), 60 N. E. Rep. 966.

[33] Sec. 194*d*, *ante*.

[34] See Sec. 194*b*, *ante*. Kimball v. Dresser, 98 Me. 519; Baden v. Bertenshaw, 68 Kan. 32.

[35] Plummer v. Myers, 137 Fed. Rep. 660, 14 Am. B. R. 805.

ing to bankruptcy.[36] If the trustee fails to allege any one of these elements, his bill, declaration or petition is bad on demurrer.[37] If he fails to prove all of these elements judgment should be entered for the defendant.

In a suit to set aside a fraudulent conveyance or transfer under paragraph one of Section 67*e* the trustee should allege and prove, *first*, the filing of the petition in bankruptcy, the adjudication of the debtor, and his appointment and qualification as trustee of the estate of the bankrupt; *second*, that the transfer was made within four months prior to the filing of the petition in bankruptcy; and, *third*, that it was made with the intent and purpose on the debtor's part to hinder, delay or defraud his creditors. The phrase "to hinder, delay or defraud his creditors" as used in the bankruptcy act has been construed to have the same meaning as the same words used in statutes against conveyances fraudulent as against creditors from the time of the statute of 13 Elizabeth.[38] This allegation should state facts sufficient to make a case under the statute of frauds.[39] Insolvency is not a statutory element necessary to recovery in this class of cases. It is not necessary to aver insolvency except as it may be involved in establishing a transfer to hinder, delay or defraud creditors. In case the defendant is an assignee of the fraudulent grantee, the trustee should show that he had knowledge of the fraud. The defendant may plead as a defense to the action that he is a

[36] See Sec. 194*c*, *ante*. Turner v. Fisher, 133 Fed. Rep. 594, 13 Am. B. R. 243; Crooks v. People's Nat. Bank, 3 Am. B. R. 238; *In re* Blair, 102 Fed. Rep. 987, 4 Am. B. R. 220; Peck v. Connell (Supr. Ct. of Pa.), 8 Am. B. R. 500; Levor v. Seiter (Sup. Ct. N. Y., App. Div.), 8 Am. B. R. 459; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; Taft v. Fourth Nat. Bank (Sup. Ct. Cir.), 2 N. B. N. 1145, 8 Ohio N. P. Rep. 59.

[37] Peck v. O'Connell (Super. Ct. Pa.), 8 Am. B. R. 500; Hicks v. Langhorst (Hamilton Co. Common Pleas, Ohio), 6 Am. B. R. 178; Martin v. Bigelow, 36 Misc. Rep. (N. Y.) 298, 7 Am. B. R. 218.

[38] Githens v. Shiffler, 112 Fed. Rep. 505, 7 Am. B. R. 453; Lansing Boiler & Engine Wks. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558.

In what cases property may be recovered, see Sec. 160, *ante*.

[39] Johnston v. Forsyth Mercantile Co., 127 Fed. Rep. 845, 11 Am. B. R. 669.

purchaser in good faith for a fair present consideration and the burden is upon him to establish it.[40]

The trustee may make a case under the third paragraph of Section 67*e* by alleging and proving, *first,* the filing of the petition in bankruptcy, the adjudication, and his appointment and qualification as trustee of the estate of the bankrupt; *second,* the insolvency of the debtor at the time the transfer was made; *third,* that the transfer was made within four months prior to the filing of the petition in bankruptcy; and, *fourth,* that such transfer is null and void under the laws of the state, territory or district in which said property is situate. This last allegation should include all that would be necessary for a creditor to allege in the state court if he were suing to recover the property had bankruptcy not intervened. It seems that he should also show that he has not sufficient assets in his hands to satisfy the claims of the creditors of the bankrupt.[41]

In a suit to set aside a fraudulent conveyance under Section 70*e* the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication, and his appointment and qualification as trustee of the estate of the bankrupt. He should then state facts to show that the transfer complained of was fraudulent as against creditors under the state laws as construed by the courts of the state.[42] It is not necessary to allege that the transfer was within four months.[43] He should show that he has not sufficient funds in his hands to satisfy the claims of the creditors of the bankrupt.[44]

In a suit to set aside a preference or fraudulent conveyance the burden is upon the trustee to establish that the preference

[40] McNulty v. Wiesen, 130 Fed. Rep. 1012, 12 Am. B. R. 341; Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; Horner-Gaylord Co. v. Miller & Bennett, 147 Fed. Rep. 295.

[41] Mueller v. Bruss, 112 Wis. 406, 8 Am. B. R. 442.

[42] *In re* Mullen, 101 Fed. Rep. 413, 4 Am. B. R. 224; Andrews v. Mather, 134 Ala. 358, 9 Am. B. R. 296; Schreyer v. Scott, 134 U. S. 405, 409, 33 L. Ed. 955.

As to what transfers may be set aside, see Sec. 158, *ante.*

[43] *In re* Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 927; *In re* Scrinopskie, 10 Am. B. R. 221.

[44] Mueller v. Bruss, 112 Wis. 406, 8 Am. B. R. 442.

or transfer is fraudulent under the bankruptcy act.[45] The burden is upon the defendant to establish the affirmative defense of *bona fide* purchaser for value.[46]

The books of the bankrupt, the schedules and appraisement are competent evidence on the question of insolvency within four months of the date of the filing of the petition, but are not conclusive.[47] Where the quantity and value of the bankrupt's assets were not materially diminished from the time of the transfer until the commencement of the proceedings in bankruptcy, the court and jury may find that the debtor was insolvent when he made the transfer.[48] The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition,[49] unless the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding. In that case the effect of insolvency at the date the act was committed may be deemed as established by the adjudication.[50] The question of insolvency is one of fact to be submitted to the jury under proper instructions when the case is tried to a jury.[51]

Whether a creditor has reasonable cause to believe that a preference is given is determined by the conduct of the

Ct. Rep. 14, 10 Am. B. R. 762; Capital Nat. Bank v. Wilkerson, (Ind.) 72 N. E. Rep. 247; *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123, 128; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; Kimball v. Dresser, 98 Me. 519; Edwards v. Milling Co., 108 Mo. App. 275; Halbert v. Pranke, 91 Minn. 204.

[46] Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; McNulty v. Wiesen, 130 Fed. Rep. 1012, 12 Am. B. R. 341.

[47] *In re* Docker-Fisher Co., 123 Fed. Rep. 190, 10 Am. B. R. 584; *In re* Mandel, 127 Fed. Rep. 863, 10 Am. B. R. 774; Bank of N. Y. v. Southern Nat. Bank, 170 N. Y. 1; Hackney v. Hargreaves Bros., 68 Neb. 625, 13 Am. B. R. 164, overruling 10 Am. B. R. 213.

[48] Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[49] *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; Kimball v. Dresser, 98 Me. 519; Edwards v. Milling Co., 108 Mo. App. 275; *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

[50] DeGraff v. Lang, 87 N. Y. Supp. 78, 92 N. Y. Supr. Ct. (App. Div.) 564.

[51] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Upson v. Mt. Morris Bank (N. Y. Sup. Ct., App. Div.), 14 Am. B. R. 6.

parties and the nature of the transaction.[52] Whether or not the facts and circumstances in the possession of the creditor at the time the alleged preference was made, were sufficient to cause an ordinarily prudent business man to conclude a preference was intended is a question for the jury and not for the court in a jury trial.[53]

Whether the defendant is a purchaser in good faith for a present fair consideration is a question for the jury under instructions.[54]

Where a preference is set aside the creditor's debt is extinguished by a discharge, unless he comes in and proves his debt like any other creditor.[55]

The decree annulling a fraudulent conveyance or transfer may contain a direction for a conveyance by a person holding title to the trustee in bankruptcy.[56] Under the present act it may be doubted if it is necessary to direct such a conveyance because the title is vested in the trustee by operation of law. If the purchase was joint the judgment or decree of recovery should be joint.[57] Where real estate has been conveyed to a *bona fide* purchaser by bankrupt's grantee before commencement of a suit to recover, the judgment should not provide that the conveyance from bankrupt be set aside, as this would cloud the *bona fide* purchaser's title.[58]

[52] Hackney v. Hargreaves Bros., 68 Neb. 625, 13 Am. B. R. 164, overruling 10 Am. B. R. 213; Sebring v. Wellington, N. Y. Supr. Ct. (App. Div.), 671, 6 Am. B. R. 671.

In Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147, the supreme court says "the act of 1898 makes the result obtained by the creditor and not the specific intent of the

[45] Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478; Keith v. Gettysburg Nat. Bank, 23 Pa. Superior debtor, the essential fact."

[53] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; Wetstein v. Franciscus (C. C. A. 2d Cir.), 133 Fed. Rep. 900, 13 Am. B. R. 326; Sundheim v. Ridge Ave. Bank, 138 Fed. Rep. 951, 15 Am. B. R. 132; Evans v. Nat. Broadway Bank, 88 N. Y. Supr. Ct. (App. Div.) 549, 85 N. Y. Sup. 101.

[54] Montgomery v. McNicholas, 138 Fed. Rep. 956, 15 Am. B. R. 93.

[55] See Provable Debts, Chap. XIII.

[56] Keating v. Keefer, No. 7635 Fed. Cas., 5 N. B. R. 133; Burkholder v. Stump, No. 2165 Fed. Cas., 4 N. B. R. 597.

[57] Schulenburg v. Kabwrech, No. 12487 Fed. Cas., 2 Dill. 132.

[58] Skillin v. Maibrunn, 78 N. Y. Supp. 436.

It has been held that an assignee for the benefit of creditors who has proceeded under the state law to distribute the property of the bankrupt can not be held personally liable for the assets which came into his hands and were distributed. But the trustee "must seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act." [59] A conveyance or transfer should be set aside *in toto* when the trustee elects to avoid it at all.[60]

The express provision of the bankrupt act is that the trustee may, in case of a fraudulent preference or transfer, recover the property or the value of it from the person so receiving it or so to be benefited by it.[61] Where property has been sold at a judicial sale, or where a *bona fide* sale for a valuable consideration has been subsequently made by the person taking the property in fraud of creditors, it can not be recovered in specie.[62] The only remedy of the trustee is for the value of it. The measure of damages in such cases is the actual value of the property at the time of the conveyance.[63] The trustee is not bound by the price paid by a purchaser at a judicial sale or otherwise as the value of the property. All kinds of damages are, strictly speaking, for the jury, and however clear and plain may be the rule of law on which the damages are to be founded, the act of finding is for it.[64] The trustee is entitled to interest from the commencement of the suit.[65]

[59] Cragin v. Thompson, No. 3320 Fed. Cas., 2 Dill. 513, per Judge Dillon; *In re* Cohn, No. 2966 Fed. Cas., 6 N. B. R. 370; Jones v. Kinney, No. 7473 Fed Cas., 5 Ben. 259; Anshutz v. Hoerr, 1 Fed. Rep. 594-5.

[60] Wehl v. Wald, 3 Fed. Rep. 93.

[61] B. A. 1898, Sec. 60*b* and Sec. 70*e*.

[62] Hackney v. First Nat. Bank, 68 Neb. 594, 11 Am. B. R. 240.

[63] Frank v. Musliner, 28 N. Y. L. J. 765, 9 Am. B. R. 229; Clarion Bank v. Jones, 21 Wall. 339, 22 L. Ed. 542; Conard v. Insurance Co., 6 Pet. 274, 8 L. Ed. 392; Comly v. Fisher, No. 3053 Fed. Cas., s. c. Taney, 121; Marshall v. Knox, 16 Wall. 559, 21 L. Ed. 481; Eby v. Schomacher, 29 Penn. St. 40; Davis v. Anderson, No. 3623 Fed. Cas., 6 N. B. R. 145; *In re* Rosenberg, No. 12055 Fed. Cas., 3 Ben. 366; Smith v. Kehr, No. 13071, 2 Dill. 50.

[64] Alder v. Keighley, 15 M. & W. 117; Clarion Bank v. Jones, 21 Wall. 325, 22 L. Ed. 542.

[65] Kaufman v. Treadway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682.

CHAPTER XIX.

EXAMINATIONS.

§ 204. When a bankrupt may be examined.

The bankrupt may be examined when he is present at the first meeting of his creditors and at such other times as the court shall order.[1] The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee.[2] For convenience the same day is usually selected as that upon which the first creditors' meeting is held. The examination may be had at any time after the petition is filed either in voluntary or involuntary bankruptcy.[3] The first examination is regularly made at the first creditors' meeting.

A bankrupt may be examined as many times as the judge or referee shall order. The fact that one creditor has examined the bankrupt is no reason for withholding the privilege from another creditor.[4] The referee should, in the exercise of a sound discretion, so regulate the time, manner and courses of examination as to protect the bankrupt from annoyance, and oppression, and mere delay. At the same time full and fair opportunity should be allowed to the creditors to inquire into such matters as the statute permits.[5] Where one full examination of the bankrupt has been made, a subsequent examination will not ordinarily be permitted except for cause.[6]

[1] B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086.

[2] Gen. Ord. 12; B. A. 1898, Sec. 55*b*.

[3] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[4] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; *In re* Mellin, 97 Fed. Rep. 326, 3 Am. B. R. 226; *In re* Adams, No. 40 Fed. Cas., c. 3 Ben. 7; *In re* Gilbert, No. 5410 Fed. Cas., 1 Low. 340; *In re* Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

[5] *In re* Horgan (C. C. A. 2d Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Mellen, 97 Fed. Rep. 326, 3 Am. B. R. 226.

[6] *In re* Frisbie, No. 5131 Fed. Cas., 13 N. B. R. 349; *In re* Isidor, No. 7105 Fed. Cas., 2 Ben. 123; *In*

Where an examination is sought or carried on for the purpose of gratifying malice or mere curiosity, it may be arrested.[7]

An examination may be adjourned to a certain day, but if it is adjourned without day a new notice of examination is necessary.[8]

It will sometimes be necessary to determine at what stage in the proceedings does the right to examine the bankrupt cease. There can be no doubt that this right extends up to the final adjudication upon his application for a discharge.[9] The hearing upon a petition for a discharge may be continued for the purpose of affording an opportunity to examine the bankrupt in a proper case.[10] It has been held that a bankrupt can be compelled, after his discharge, to submit to an examination.[11] This was a matter of express enactment in the act of 1867.[12] There is no limitation in the statute of the court's jurisdiction over his person in respect to the time of his discharge. The language of Section 21 authorizes the court, by order, to require the bankrupt to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration in bankruptcy. The only limitation, with reference to time, seems to be that the estate shall still be in the process of administration. There can be no doubt of the right to examine a bankrupt, upon a proper application being made for that purpose, after his discharge is suspended or vacated.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any offi-

re Frizelle, No. 5153 Fed. Cas., 5 N. B. R. 122; *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[7] *In re* Salkey, No. 12252 Fed. Cas., 5 Biss. 486.

[8] *In re* Price, 1 Am. B. R. 419, 91 Fed. Rep. 635.

[9] Gen. Ord. 12; *In re* Solis, No. 13165 Fed. Cas., 4 Ben. 143; *In re* Vetterlein, No. 16926 Fed. Cas., 5 Ben. 7; *In re* Frizelle, No. 5132 Fed. Cas., 5 N. B. R. 119.

[10] *In re* Seckendorf, No. 12600 Fed. Cas., 2 Ben. 462; *In re* Mawson, No. 93210 Fed. Cas., 1 N. B. R. 271.

[11] *In re* Westfall Bros. Co., 8 Am B. R. 431.

[12] R. S. Sec. 5104.

cer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy.[13] The examination of such persons rests in the discretion of the court. A creditor can not demand the examination of a particular person as of right.[14]

Where the bankrupt is about to leave the district in which he resides or has his principal place of business, to avoid examination, he may be arrested and kept in custody, not exceeding ten days, until he shall be examined and released or give bail to appear for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.[15] It has been held that a court of bankruptcy is without power to make an order for the extradition of a bankrupt, after he had escaped into another district, for the purpose of an examination,[16] and that a bankrupt can not be examined by the order of a court of bankruptcy other than the one in which the bankruptcy proceedings are pending in the exercise of ancillary jurisdiction.[17]

§ 205. When persons other than a bankrupt may be examined.

The statute expressly authorizes the referee to exercise the powers vested in courts of bankruptcy for the administering of oaths to, and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.[1]

A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person,

[13] Gen. Ord. 30; *In re* Gilbert, 2 N. B. N. 378.

[14] *In re* Andrews, 130 Fed. Rep. 383, 12 Am. B. R. 267; *In re* Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11.

[15] B. A. 1898, Sec. 9*b*. For proceedings to detain a bankrupt for examination, see When a bankrupt may be arrested, Sec. 219, *post*.

[16] *In re* Hassenbusch (not reported), but affirmed *In re* Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

[17] *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538. See Sec. 210*a*, *post*.

But see *In re* Sutter Bros, 131 Fed. Rep. 654, 11 Am. B. R. 632.

[1] B. A. 1898, Sec. 38, clause 2.

including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this act, provided that the wife may be examined only touching business transacted by her or to which she is a party,[2] and to determine the fact whether she has transacted or been a party to any business of the bankrupt.[3]

The language of these provisions is very general. They give the referee power to summon any person who could give evidence in a court at law.[4] They authorize the examination of him upon all matters, which are likely to arise in respect to the bankrupt or his property. The only limitation as to time within which this power may be exercised is that the estate shall be in process of administration in bankruptcy. The judge or referee may therefore summon a witness at any time after the commencement of proceedings until the estate is closed by order of court. The referee of course can only summon witnesses while the case is pending before him upon reference.

Prior to the amendment of Feb. 5, 1903, only persons, who were competent witnesses under the laws of the state in which the proceedings were pending, could be examined.[5] This is the rule with reference to examination of witnesses in proceedings instituted prior to the amendment. A wife not competent to testify under the law of the state can not be compelled to testify in such bankruptcy proceedings.[6] In proceedings instituted since the amendment of Feb. 5, 1903, the competency of witnesses under the state law is immaterial. A wife

[2] B. A. 1898, Sec. 21, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Andrews, 130 Fed. Rep. 383, 12 Am. B. R. 267.

[3] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797. Compare R. S. Sec. 5087.

[4] This includes a trustee in insolvency under a state proceeding. See *In re* Pursell, 114 Fed. Rep. 371, 8 Am. B. R. 96.

[5] *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419; *In re* Westfall Bros. Co., 8 Am. B. R. 431.

[6] *In re* Jefferson, 96 Fed. Rep. 826, 3 Am. B. R. 174; *In re* Fowler, 93 Fed. Rep. 417, 1 Am. B. R. 555.

may be examined only touching business transacted by her or to which she is a party and to determine the fact whether she has transacted or been a party to any business of the bankrupt's.[7]

§ 206. How to obtain an order for an examination.

The judge or referee may make the order for an examination.[1] The referee usually makes the order for examination after the order requiring the bankrupt to attend before the referee, which is made by the judge in the order of reference.[2] Orders for examinations of a bankrupt subsequent to the first one are regularly made only upon application and for cause shown.[3]

It has been held that a court of bankruptcy has no special ancillary power under the bankruptcy statute to make an order on the application of the trustee of a bankrupt whose estate is being administered in another district, requiring persons residing within the district to appear before a referee for examination concerning the acts, conduct, and property of the bankrupt. A court having charge of the administration of a bankrupt's estate has power to order that any person having knowledge "concerning the acts, conduct, or property of the bankrupt," but who resides without the district or state, and more than 100 miles from the court, shall be examined before a commissioner in accordance with the provisions of the general statutes or practice in equity cases, and that persons so ordered to be examined may be compelled by proper process, as in other cases, to appear and testify.[4]

[7] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797; *In re* Worrell, 125 Fed. Rep. 159, 10 Am. B. R. 744.

[1] B. A. 1898, Sec. 21; Sec. 1, clause 7; Sec. 38, and Official Form No. 28, see Form No. 47, *post*.

[2] Gen. Ord. 12.

[3] *In re* Frisbie, No. 5131 Fed. Cas., 13 N. B. R. 349; *In re* Isidor, No. 7105 Fed. Cas., 2 Ben. 123; *In re* Frizelle, No. 5133 Fed. Cas., 5 N. B. R. 122.

[4] *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538.

This was done *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554, and *In re* Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681.

See also *In re* Watkinson & Co., 130 Fed. Rep. 218, 12 Am. B. R.

The application for an order requiring the bankrupt or other person to appear for examination may be made by any officer, bankrupt or creditor.[5] A receiver[6] or a trustee[7] are such officers A creditor is entitled to an order for an examination before he has filed proof of his claim in set form.[8] The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt. It seems sufficient proof if the party is named in the schedules attached to the petition in bankruptcy.[9] A creditor is not entitled as of right to examine any person he may name, if in the judgment of the trustee and referee that it is not desirable or in the interest of the estate.[10]

The application is usually made by petition or motion. The petition must designate the persons to be examined, but it need not specify the particular matters concerning which an examination is sought.[11] In a proper case a letter or a verbal request may be sufficient upon which to make the order for examination.[11] Less proof, of course, is required from an officer, as a trustee, than from a creditor.[12] The proceeding is *ex parte*, and no previous notice is required to be given to any party.[13] The form of the order for an examination of a bankrupt is prescribed by the supreme court.[14] It should be entered of record among the proceedings before the referee.

370; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

[5] B. A. 1898, Sec. 21.

[6] *In re* Fixen, 96 Fed. Rep. 748, 2 Am. B. R. 822.

[7] *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

[8] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498; *In re* Walker, 96 Fed. Rep. 550, 3 Am. B. R. 35; *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[9] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498.

[10] *In re* Andrews, 130 Fed. Rep. 383, 12 Am. B. R. 267; *In re* Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11.

[11] *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; *In re* Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11.

[12] *In re* McBrien, No. 8665 Fed. Cas., 2 Ben. 513

[13] *In re* Macintire, No. 8821 Fed. Cas., 1 Ben. 277.

[14] Official Form No. 28; see Form No. 47, *post*.

§ 207. Notice of examination to bankrupts, creditors and witnesses.

A copy of the order for examination of the bankrupt, signed by the referee, should be delivered to the bankrupt as soon as may be.[1] A copy of the order is used in place of a summons or subpœna. Where service is made upon a bankrupt by delivering him a copy of the order, proof of service may be made by affidavit of the person delivering it or by a written acceptance of service by the bankrupt. If the bankrupt appears, he waives any irregularity in the service. A bankrupt is a party to the proceedings, and is required to comply with all lawful orders of the judge or referee.[2] If he disobeys or resists any lawful order of a referee, he is liable to be committed by the judge for contempt.[3]

The bankrupt can not be required to attend at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, unless ordered by the court or a judge thereof for cause shown.[4] He is not entitled to witness fees in any case.[5] But he is allowed his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence.[6]

When the bankrupt is present before the court or referee he may be examined without previous notice being given him.[7] In other cases the bankrupt is entitled to a reasonable notice of his examination.

A reasonable notice is such time as will enable him to reach and appear before the court or referee with such knowledge as may be under his control upon the matters of the investigation or information asked for. "This depends upon the circum-

[1] Official Form No. 28. See Form No. 47, *post*.

[2] B. A. 1898, Sec. 7, clause 2.

[3] B. A. 1898, Sec. 41*a* and Sec. 2, clause 16.

[4] B. A. 1898, Sec. 7, clause 9.

[5] In re Okell, No. 10475 Fed. Cas., 2 Ben. 144; *In re* McNair, No. 8907 Fed. Cas., 2 N. B. R. 219.

[6] B. A. 1898, Sec. 7, clause 9.

[7] B. A. 1898, Sec. 7, clause 9; *In re* Bromley & Co., 3 N. B. R. 86; *In re* Brandt, No. 1812 Fed. Cas., 2 N. B. R. 215.

stances and facts surrounding the bankrupt, the distance he is from the court or the place of his examination, and also upon what, if any, particular facts he is to be examined If the defendant is a merchant, and has been doing a large and complicated business, and he is notified that his examination is to cover his entire business operations, a reasonable time would manifestly be much longer than in a case where the notice of examination was in regard to a few items of his property." [8]

The referee is also required to give at least ten days' notice to all his creditors of all examinations of the bankrupt.[9] This notice is regularly sent by mail to the respective addresses of the creditors as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors.[10] The creditors may waive notice in writing.[11] No notice to creditors of the examination of witnesses, other than the bankrupt, is required.

Where a person is not a party to the proceedings, and therefore not bound to obey the orders made therein, he must be brought before the court for examination by process of summons. A bankrupt, as has just been stated, is a party, and need not be served with summons. A creditor who has proved his claim is bound to obey all the orders of the court touching his alleged debt, and therefore may be summoned by service of a copy of the order for an examination of him in respect to his claim.[12] The form of summons is prescribed.[13] This must issue out of court under the seal thereof and be tested by the clerk.[14] Blanks with the signature of the clerk and the seal of the court may be furnished to the referee upon application.[15]

[8] *In re* Bromley & Co., 3 N. B. R. 692-3.

[9] B. A. 1898, Sec. 58*a*.

[10] B. A. 1898, Sec. 58*a*; Gen. Ord. 21, par 2.

[11] B. A. 1898, Sec. 58*a*.

[12] Gen. Ord. 21, par. 6; *In re* Kyler, No. 7956 Fed. Cas., 2 Ben. 414; *In re* Paddock, No. 10657 Fed. Cas., 6 N. B. R. 132; *In re* Pease, 29 Fed. Rep. 593.

[13] Official Form No. 30, see Form No. 49, *post*.

[14] Gen. Ord. 3; Official Form No. 30, see Form No. 49, *post*.

[15] Gen. Ord. 3; *In re* Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11.

The summons may be served by any person. The return is in the form of an affidavit of personal service prescribed in Form No. 30.

It may be served upon witnesses living without the district, but within one hundred miles of the place of testifying.[16] But no person can be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.[17]

A person who disobeys a summons to appear before a referee to be examined as a witness may be punished for contempt.[18]

§ 208. How an examination is made.

At the time and place appointed, the bankrupt, creditor or other witness must present himself for examination. The bankrupt can not refuse to be sworn by reason of his claiming that he has an off-set which extinguishes, or that the statute of limitations has run against, the claim of the creditor upon whose application he is to be examined. So long as the debt stands proved and unimpeached the bankrupt may be sworn and examined.[1] A person is exempt from arrest or

[16] R. S. Sec. 876; *In re* Woodward, No. 18000 Fed. Cas., 8 Ben. 112.

[17] B. A. 1898, Sec. 41*a*; *In re* Cole 133 Fed. Rep. 414, 13 Am. B. R. 300; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

[18] B. A. 1898, Sec. 41 and Sec. 2, clause 16; *In re* Kerber, 125 Fed. Rep. 653, 10 Am. B. R. 747, it was held that his mileage and fee for one day's attendance must be paid or tendered witness before he could be attached for contempt.

[1] *In re* Kingsley, No. 7818 Fed. Cas., 6 Ben. 300; *In re* Winship, No. 17878 Fed. Cas., 7 Ben. 194; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

An examination was allowed when the creditor's claims had been proved and protest filed against them. *In re* Belden, No. 1241 Fed. Cas., 4 N. B. R. 194; *In re* Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49, it was held that a witness was bound to take the oath although not bound to answer incriminating questions.

service of process while attending as a witness before the judge or referee.[2]

The testimony before a referee is usually taken orally. It is the duty of the referee, upon application of any party in interest, to preserve the evidence taken, or the substance thereof, as agreed upon by the parties before them when a stenographer is not in attendance.[3] In practice, the evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narrative, unless he determines the examination should be taken by question and answer.[4] He is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the evidence.[5]

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross examination, which shall be had in conformity with the mode now adopted in the courts of law.[6]

A witness is not entitled to be attended or represented by counsel during his examination.[7] The bankrupt, being a party to the proceedings, is entitled to have the assistance of counsel. The true rule, with reference to what assistance he is entitled to, is thus stated by Judge Lowell: "The questions to a bankrupt are usually concerning matters of fact, and in the vast majority of cases involve nothing requiring advice or consultation; and the presence of counsel, with the right to object to improper questions, and to uphold the rights of the bankrupt

[2] *In re* Kimball, No. 7767 Fed. Cas., 2 Ben. 38. See also Service of subpœna, Sec. 73, *ante*.

[3] B. A. 1898, Sec. 39, clause 9.

[4] Gen. Ord. 22.

[5] B. A. 1898, Sec. 38, clause 5.

[6] Gen. Ord. 22.

The bankrupt may be cross-examined, see *In re* Levy, No. 8296 Fed. Cas., 1 Ben. 496; *In re* Leachman, No. 8157 Fed. Cas., 1 N. B. R. 391; *In re* Bragg, No. 1799 Fed. Cas., s. c. 5 Law Rep. 323.

[7] *In re* Abbey Press (C. C. A. 2d Cir.), 134 Fed. Rep. 51, 13 Am. B. R. 11; *In re* Comstock, No. 3080 Fed. Cas., 3 Saw. 517; *In re* Fredenberg, No. 5070 Fed. Cas., 2 Ben. 133; *In re* Stuyvesant Bank, No. 13582 Fed. Cas., 6 Ben. 33; *In re* Feinberg, No. 4716 Fed. Cas., 3 Ben. 162.

in substantially the same manner that he would do if his client were called to the stand in his own cause in any other court, and with the further reserved right to advise with him concerning his answers when the referee can see cause therefor, meets, as it seems to me, all the requirements of justice in this regard."[8] The wife of the bankrupt is not entitled to the assistance of counsel any more than any other witness, and the bankrupt's counsel has no right to advise her while under examination.[9] Where time is needed to refresh the memory by referring to books or papers, or for the production of any written instruments or documents, it should be granted.[10]

When objections are made to questions and answers in the course of the examination, the grounds of the objection and the ruling of the referee should be noted by the referee. It is the duty of the referee to rule upon objections. Gen. Ord. 22 expressly requires him to note "his decision." But he should not exclude evidence offered, although he may decide it to be incompetent, immaterial or irrelevant.[11] He should receive all the evidence offered and make a record of all that transpires on the examination of the witness. Questions, objections, rulings, exceptions and answers should all be taken down for the use of the court. This is true whether he is acting in his judicial capacity as referee, or as a master under an order to report facts and conclusions of law, or taking a deposition under a commission. The reason is that in the first instance the matter may be reviewed by the judge, who may differ with the referee with respect to the admissibility of the evidence; and in case he is acting as a master or commis-

[8] *In re* Tanner,, No. 13745 Fed. Cas., 1 Low. 215. See also *in re* Judson, No. 7562 Fed. Cas., 2 Ben. 210; *In re* Lord, No. 8502 Fed. Cas., 3 N. B. R. 243. See *In re* Cobb 7 Am. B. R. 104, as to the right of bankrupt to cross-examine witnesses.

[9] *In re* Schonberg, No. 12477 Fed. Cas., 7 Ben. 211.

[10] *In re* Tanner, No. 13745 Fed. Cas., 1 Low. 215.

[11] *In re* Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206; *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785; *In re* Lipset, 119 Fed. Rep. 379, 9 Am. B. R. 32.

sioner, the court, which is to decide the matter, is entitled to have all of the evidence for that purpose and to decide what evidence shall be excluded and what may be considered. The proper practice is for the referee to make his ruling and thereupon require the question to be answered. If his ruling be against the question and the court shall reverse his finding, it will not be necessary to have a re-examination of the witness. If the court shall affirm his ruling, the answer may properly be disregarded by the court.[12]

The referee need not stay the examination for the purpose of certifying each question to the judge for his decision.[13] The examination should continue and the question be certified after the deposition is complete to prevent delay. If either party persists in offering incompetent, immaterial or irrevelant matter in evidence over the objection and ruling of the referee the remedy of the other party is to apply to the court for costs.[14] The court is expressly given "power to deal with the costs of incompetent, immaterial or irrevelant depositions, or parts of them, as may be just." [15]

In case a witness refuses to be sworn or to answer any particular question, the referee should rule upon the question. If either party is dissatisfied with his ruling, he may have the question certified to the judge for review.[16] The examination may be adjourned pending the decision of the judge upon such question.

Where a bankrupt or a witness refuses to answer a question when ordered to do so by the referee, the matter may also be brought to the attention of the judge upon an appli-

But see *In re* Wilde's Sons, 131 Fed. Rep. 142, 11 Am. B. R. 714.

[12] *In re* De Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723, 746.

[13] *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206.

[14] *In re* Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681.

[15] Gen. Ord. 22.

[16] Gen. Ord. 27, Official Form 56, see Form No. 136, *post*. Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am. B. R. 206.

cation to commit for contempt.[17] So also where the bankrupt makes an unsatisfactory answer which is untrue, as that "he does not remember," or "is unable to tell," the court may commit him for contempt. In England it has been held that a bankrupt may be committed by the court for answers upon his examination, which on the whole are unsatisfactory, and which do not really and truly impart information, which the bankrupt must possess; as where his answers are so clearly of an improbable character that they can not be believed.[18] In one case [19] bankrupts were committed for contempt because they refused to account for more than twenty thousand dollars' worth of property which had been traced into their possession. Where a bankrupt withdraws from the office of the referee before the completion of his examination, he may be punished for contempt.[20] It has been held that a state court has no jurisdiction to punish a party for perjury committed in the course of an examination before a referee.[21]

When the examination is completed, the deposition must be read over to the witness and signed by him in the presence of the referee.[22] The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the cost of incompetent, immaterial and irrelevant depositions, or any parts of them, as may be just.[23]

The examination may be adjourned from time to time as may suit the convenience of the parties.

[17] B. A. 1898, Sec. 41*a* and *b*. *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785.

[18] *Ex parte* Lord, 16 Mees. & W. 462; *In re* Bradbury, 11 Jur. 189, 14 C. B. 15; *In re* Taylor, 8 Ves. 328; *Ex parte* Nowlan, 6 Durn. & East, 58, 6 T. R. 118. As to power of the English rule upon American cases, see *In re* Mooney, No. 9748 Fed. Cas., 14 Blatch. 204.

[19] *In re* Salkey, No. 12253 Fed. Cas., 6 Biss. 269, affirmed on petition for *habeas corpus* to discharge the prisoners, No. 12254 Fed. Cas., 6 Biss. 280.

Consult also *In re* How. No. 6747 Fed. Cas., 18 N. B. R. 565; *In re* Dresser, No. 4077 Fed. Cas., 3 N. B. R. 557; *In re* Mooney, No. 9748 Fed. Cas., 14 Blatch 204.

[20] *In re* Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

[21] State v. Pike, 15 N. H. 83. Consult Commonwealth v. Walker, 108 Mass. 309.

[22] Gen. Ord. 22.

[23] Gen. Ord. 22.

The testimony of a bankrupt should be admitted in evidence even where he failed to sign it.[24]

§ 209. Upon what topics the bankrupt may be examined.

The bankrupt may be examined concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.[1]

He must answer all questions relating to these subjects fully and completely.[2] A large latitude of inquiry is allowed in the examination of the bankrupt and other persons closely connected with him in his business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor.[3] Where questionable proceedings have been disclosed greater

[24] *In re* Bard, 108 Fed. Rep. 208, 5 Am. B. R. 810.

[1] B. A. 1898, Sec. 7, clause 9. Compare R. S. Sec. 5086.

[2] *In re* Salkey, No. 12253 Fed. Cas., 6 Biss. 269.

[3] *In re* Horgan (C. C. A. 2d Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* Cliffe, 97 Fed. Rep. 540, 3 Am. B. R. 257.

In U. S. v. Wechsler, 16 Am. B. R. 1, Judge Holt, in charging the jury in a trial of the bankrupt for perjury uses this language: "It is a broad field of inquiry and intended to be so, and this section (21 of the bankrupt act) is the section under which the investigations usually take place about the property of the bankrupt, particularly in cases where there is any suspicion that there has been any attempt to take property and conceal it from creditors. As soon as a receiver is appointed, if he has any such suspicion, he gets one of these orders; the bankrupt is brought up for examination; and the question then is what property he has. If there have been recent transfers of property or payments of money on the eve of bankruptcy, that is a suspicious fact, particularly if they have been transferred to relatives and connections. All such transfers become material subjects of inquiry; and in order to ascertain what the truth is about them the party examining the bankrupt is not confined to a mere inquiry, or a mere explanation of what it was transferred for, but counsel have a right to inquire into all the surrounding circumstances in the case in order to ascertain what the truth is in that respect."

latitude in the prosecution of inquiries should be allowed.[4] Where a bankrupt fails to testify fully and fairly and truthfully, the court or referee is at liberty to accept his testimony as it may seem to be supported by other witnesses, or if unworthy of credit it may be rejected altogether.[5]

The bankrupt may be examined with reference to property which has come into his possession and not been accounted for,[6] or with relation to his wife's property if it is shown that he may possibly have an interest in it,[7] or any other property in which he may possibly have an interest,[8] or in reference to matters which transpired before the creation of the debt,[9] or for the purpose of eliciting facts to be used in opposing his discharge.[10] He may be required to furnish the trustee with the combination to his safe.[11] When he seeks to be discharged, he must submit himself, if required, to be examined, with a view to show whether he has made a full and fair surrender of his property and statement of his debts.[12] But it is not competent for the referee to summon witnesses who may know, or be suspected of knowing, facts pertinent to or that might be serviceable in the preparation of specifications against his discharge.[12] In regard to such facts, a creditor is left to establish them on the trial as parties do in ordinary trials at law. It is not a sufficient excuse for not answering a question put to the bankrupt that he has replied to it at a former examination held at the instance of some other creditor or the assignee.[12]

[4] *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259.

[5] *In re* Tudor, 100 Fed. Rep. 796, 4 Am. B. R. 78; *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561.

[6] *In re* Salkey, No. 12253 Fed. Cas., 6 Biss. 269; *In re* McBrien, No. 8666 Fed. Cas., 3 Ben. 481.

[7] *In re* Horgan (C. C. A. 2d Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *In re* Craig, No. 3323 Fed. Cas., 4 N. B. R. 50; *In re* Clark, No. 2805 Fed. Cas., 4 N. B. R. 237.

[8] *In re* Bonesteel, No. 1628 Fed. Cas., 2 N. B. R. 440; *In re* Brundage, 100 Fed. Rep. 613, 4 Am. B. R. 47.

[9] *In re* Craig, No. 3322 Fed. Cas., 3 Ben. 353.

[10] *In re* Brandt, No. 1812 Fed. Cas., 2 N. B. R. 215; *In re* Price, 91 Fed. Rep. 635, 1 Am. B. R. 419.

[11] *In re* Hooks Smelting Co., 138 Fed. Rep. 954, 15 Am. B. R. 83.

[12] *In re* Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

On the other hand, a bankrupt can not be examined touching matter wholly irrelevant to and not bearing on his bankruptcy. The bankrupt must, however, plead his privilege, if any privilege legally exists, to the particular questions propounded.[13] He is privileged from being examined in respect to property which has been acquired since the adjudication in the bankruptcy proceedings;[14] and also with reference to property which he does not own or have an interest in.[15] He can not be examined upon matters simply to gratify malice or curiosity.[16]

The bankrupt can not be compelled to answer a question the answer of which will tend to incriminate him,[17] but if the court is convinced that the answer to the question can not by any possibility incriminate him he will be required to answer it.[18] The witness may rely on that portion of the fifth amendment of the Constitution of the United States which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself."[19] The bankruptcy act provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding."[20] The reason

[13] *In re* Mellen, 97 Fed. Rep. 326, 3 Am. B. R. 226.

[14] *In re* Patterson, No. 10815 Fed. Cas., 1 Ben. 508; *In re* Levy, No. 8296 Fed. Cas., 1 Ben. 496.

[15] *In re* Van Tuyl, No. 16880 Fed. Cas., 1 N. B. R. 636.

[16] *In re* Salkey, No. 12252 Fed. Cas., 5 Biss. 486.

[17] *In re* Nachman, 114 Fed. Rep. 995, 8 Am. B. R. 180; U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755; *In re* Feldstein, 103 Fed. Rep. 269, 4 Am. B. R. 321; *In re* Kanter, 117 Fed. Rep. 356, 9 Am. B. R. 104; *In re* Scott, 95 Fed. Rep. 815, 1 Am. B. R. 49; *In re* Shera, 114 Fed. Rep. 207, 7 Am. B. R. 552; *In re* Walsh, 104 Fed. Rep. 518, 4 Am. B. R. 693; *In re* Franklin Syndicate, 114 Fed. Rep. 205, 4 Am. B. R. 511; *In re* Rosser, 96 Fed. Rep. 305, 2 Am. B. R. 755.

But see Mackel v. Rochester (C. C. A. 9th Cir.), 102 Fed. Rep. 314, 4 Am. B. R. 1; Counselman v. Hitchcock, 142 N. S. 562, 35 L. Ed. 1110.

[18] *In re* Hess, 136 Fed. Rep. 988, 14 Am. B. R. 826, s. c. 134 Fed. Rep. 109, 14 Am. B. R. 559; *In re* Levin, 131 Fed. Rep. 388, 11 Am. B. R. 382.

[19] Counselman v. Hitchcock, 142 U. S. 562, 35 L. Ed. 1110; Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

[20] B. A. 1898, Sec. 7*a*. *In re* Hess, 134 Fed. Rep. 109, 14 Am. B. R. 559, 136 Fed. Rep. 988; Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

for the rule is that this provision does not grant him the immunity contemplated by Sec. 5 of the Constitution. It can have no other effect than to protect the bankrupt against the use of his testimony in any prosecution in the courts of the United States. It would be no answer to a prosecution which might be instituted in the state courts which are not created by acts of congress and which prescribe their own rules of proceeding independently of congress. It has been held that the bankrupt waives the privilege to refuse to deliver the books of account kept by him to his trustee on the ground that the matter contained therein might tend to incriminate him by filing a voluntary petition in bankruptcy.[21] He has been required to produce his books when testimony was introduced to show that they disclosed nothing of an incriminating character.[22] It has been held that he may be required to state whether he has played cards or faro or any other games of chance with certain persons prior to the proceedings in bankruptcy, although the answer may tend to degrade him.[23]

§ 210. Upon what topics witnesses, other than bankrupts, may be examined.

When a witness is brought before the referee he may be examined concerning "the acts, conduct, or property of a bankrupt whose estate is in the process of administration." [1]

Such witnesses must answer all questions concerning the acts, conduct, or property of the bankrupt, and their dealings with him, even though their answers may furnish evidence to be used in a civil case brought, or to be brought, on behalf

[21] *In re* Sapiro, 92 Fed. Rep. 340, 1 Am. B. R. 296.

But see U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755.

[22] In Hess, 136 Fed. Rep. 988, 14 Am. B. R. 826, 134 Fed. Rep. 109, 14 Am. B. R. 559.

[23] *In re* Richards, No. 11769 Fed. Cas., 4 Ben. 303.

But see *In re* Feldstein, 103 Fed. Rep. 269, 4 Am. B. R. 321.

[1] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797; People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

of the trustee.[2] In respect to the subject prescribed by the statute upon which he may be examined, the parties are entitled to a full discovery and disclosure by him.[3] Thus a person who has purchased claims against a bankrupt may be examined in respect to the consideration paid therefore and where he obtained the money.[4] A president may be required to give the consideration of a judgment obtained by his bank.[5] It is no excuse for not answering, that his answer would reveal his own private business unnecessarily, and possibly to his prejudice in another suit then pending.[6] A witness may be required to produce books of account and other papers relating to the affairs of the bankrupt.[7] But a person is not required to answer an irrelevant question not relating to any matter of fact in issue where the answer would tend to degrade him,[8] or produce books or papers not relevant to the affairs of the bankrupt.[9]

The amendment of 1903 provides "that the wife may be examined only touching businesss transacted by her and to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."[10]

[2] *In re* Fay, No. 4708 Fed. Cas., 3 Ben. 660; *In re* Pioneer Paper Co., No. 11178 Fed. Cas., 7 N. B. R. 250; Garrison v. Markley, No. 5256 Fed. Cas., 7 N. B. R. 246; *In re* Cliffe, 3 Am. B. R. 257, 97 Fed. Rep. 540.

[3] *In re* Stuyvesant Bank, No. 13582 Fed. Cas., 6 Ben. 33; *In re* Trask, No. 14141 Fed. Cas., 7 Ben. 60; *In re* Lathrop, No. 8106 Fed. Cas., 4 N. B. R. 93.

[4] *In re* Lathrop, No. 8106 Fed. Cas., 4 N. B. R. 93; *In re* Trask, No. 14141 Fed. Cas., 7 Ben. 60.

[5] *In re* Pioneer Paper Co., No. 11178 Fed. Cas., 7 N. B. R. 250.

[6] *In re* Trask, No. 14141 Fed. Cas., 7 Ben. 60; *In re* Danforth, No. 3560 Fed. Cas., 1 Pa. Law J. 148.

[7] *In re* Fixen & Co., 96 Fed. Rep. 748, 2 Am. B. R. 822; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554.

[8] *In re* Lewis, No. 8312 Fed Cas., 4 Ben. 67.

[9] *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785.

[10] B. A. 1898, Sec. 20*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797; *In re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *In re* Worrell, 125 Fed. Rep. 159, 10 Am. B. R. 744.

Although a witness is required to disclose all matters touching the trade, property and conduct of a bankrupt, he is entitled to the usual privileges and exemptions in regard to answering questions.[11] The question of privilege of communications most frequently arises with reference to attorneys at law. A person who claims to have acted as counsel for a bankrupt can not, on that ground, refuse to be sworn as a witness.[12] The privilege can not be interposed until a question is asked which invades the privilege. The privilege of attorneys extends only to information derived from their clients as such. Information derived from other persons, or sources, although derived or obtained while acting as attorney, is not privileged.[13] The principle of the rule does not apply to the discovery of facts within the knowledge of the attorney, which were not communicated or confided to him by his client, although he became acquainted with the facts while engaged in his professional duty as the attorney of the client. Thus he may be required to answer questions in regard to the acts relating to a conveyance of land to and by him,[14] or the superintendence of an auction sale of a stock of goods and the disposition of the proceeds,[15] or whether he drew or directed the drawing of a certain deed,[16] or a certain declaration of trust between the bankrupt and certain persons named,[16] or whether at a certain date the witness received any checks drawn to the order of the bankrupt by a certain named person and what disposition was made of such checks so received,[16] or what affairs of the bankrupt were the subject of conversation between him and other persons.[16]

[11] *In re* Kreuger, No. 7942 Fed. Cas., 2 Low. 182.

[12] *In re* Woodward, No. 17999 Fed. Cas., 4 Ben. 102.

[13] People's Bank v. Brown (C. C. A. 3d Cir.), 112 Fed. Rep. 652, 7 Am. B. R. 475; *In re* O'Donohoe, No. 10435 Fed. Cas., 3 N. B. R. 245; *In re* Bellis, No. 1274 Fed. Cas., 3 Ben. 386 (partial report only), 3 N. B. R. 199; *In re* Aspinwall, No. 591 Fed. Cas., 7 Ben. 433; Spenceley v. Schulenberg, 7 East. 357.

[14] *In re* Bellis, No. 1274 Fed. Cas., 3 Ben. 386 (partial report only), 3 N. B. R. 199.

[15] *In re* O'Donohue, No. 10435 Fed. Cas., 3 N. B. R. 245.

[16] *In re* Aspinwall, No. 591 Fed. Cas., 7 Ben. 433.

Where a witness declines to testify on the ground of privileged communication it is for the court, and not for the witness, to determine whether the communication is privileged.[17] For this purpose the witness may be subjected to such questions as may be necessary to enable the court to determine the question.

A person other than the bankrupt can not be compelled to give testimony which may tend to incriminate him.[18]

Evidence taken before a referee in bankruptcy may be used in civil suits pending in either state or federal courts for the purpose of impeaching a witness.[19]

§ 210a. Examination of witnesses residing without the district.

A witness, who resides beyond the district or state and more than one hundred miles from the court, can not be compelled to appear for examination before a referee of the court in which bankruptcy proceedings are pending.[1] The examination of such witnesses may be by deposition.

The bankrupt act provides that the right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.[2] The United States laws make ample provisions for such examinations. Depositions *de bene esse* may be taken,[3] or a *dedimus potestatum* or a commission may be issued,[4] or depositions may be taken under the equity rules.[5] Ample provision is made for the issuance of a subpœna by the clerk of any court in the United States where the witnesses reside, to take the testimony of such absent wit-

[17] People's Bank v. Brown, 112 Fed. Rep. 652, 7 Am. B. R. 475.

[18] *In re* Smith, 7 Am. B. R. 213, 112 Fed. Rep. 509.

[19] Knowlton v. Mosely, 105 Mass. 136.

[1] B. A. 1898, Sec. 41*a*. *In re* Cole, 133 Fed. Rep. 414, 13 Am. B. R. 300; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

[2] B. A. 1898, Sec. 21*b*.

[3] R. S. Sec. 863.

[4] R. S. Sec. 866.

[5] R. S. Secs. 862, 917; Eq. Rules 67 and 71.

nesses before a commissioner appointed by the court where the proceedings are pending, and a neglect or refusal to attend or testify can be enforced by the judge of the court which issues the subpœna.[6] A subpœna *duces tecum* may be had and enforced in such an examination.[7] The subpœna may run to any district within one hundred miles of the place of holding court, but a person can not be compelled to attend as a witness at a distance of more than one hundred miles, and he can not be compelled to leave the state wherein he resides.[8]

It seems therefore that a court having charge of the administration of a bankrupt's assets, may order that any person having knowledge "concerning the acts, conduct or property of a bankrupt," but who resides beyond the district or state and more than one hundred miles from the court, shall be examined before a commissioner appointed for the purpose.[9] Any officer, bankrupt or creditor may apply to the court administering the bankrupt's assets for an order to take the depositions of absent, as well as resident, witnesses.[10] The court will then make an order, in a proper case, for a commission to issue to a referee or other person residing in the same district as the witnesses, authorizing him to take the depositions. Notice of the taking of the depositions must be filed with the referee in every case.[11] When depositions are to be taken in opposition to the allowance of a claim notice must also be served upon the claimant, and when in opposition to a discharge notice must be served upon the bankrupt.[11]

If the witness refuses to answer a question the judge of the bankruptcy court in the district in which the examination is

[6] R. S. Sec. 868.

[7] R. S. Secs. 868, 869.

[8] R. S. Sec. 876. B. A. 1898, Sec. 41*a*; *In re* Cole, 133 Fed. Rep. 414, 13 Am. B. R. 300; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 766.

[9] *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538; *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; *In re* Sturgeon (C. C. A. 2d Cir.), 139 Fed. Rep. 608, 14 Am. B. R. 681; *In re* Watkinson Co., 130 Fed. Rep. 218, 12 Am. B. R. 370; *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760.

[10] B. A. 1898, Sec. 21*a*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[11] B. A. 1898, Sec. 21*c*,

being had is the proper person to whom to apply to compel the witness to answer.[12]

§ 210b. When testimony may be used in subsequent proceedings.

Testimony taken upon the examination of the bankrupt is taken in the whole pending proceeding and may be introduced and read upon the hearing of a petition for a discharge.[1] The testimony of officers of a bankrupt corporation has been admitted in a subsequent proceeding by the trustee, to require them to surrender money or property of the estate alleged to be under their control.[2] But the testimony of persons other than the bankrupt is not admissible in subsequent proceedings or upon the hearing of a petition for a discharge.[3] Where a claimant was not in fact a party and could not exercise the right of cross examination at the time the witnesses were examined, the witnesses, including the bankrupt, must

[12] *In re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; R. S. Secs. 868, 869.

[1] *In re* Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Wiesen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; *In re* Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653; *In re* Cooke, 109 Fed. Rep. 631, 5 Am. B. R. 434; *In re* Bard, 108 Fed. Rep. 208, 5 Am. B. R. 810.

[2] *In re* Alphine & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653.

[3] *In re* Wiesen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; *In re* Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653.

In re Wilcox, 109 Fed. Rep. 628, 6 Am. B. R. 366, the circuit court of appeals for the second circuit said: "The testimony of third persons upon these roving attempts at discovery is not directed to a defined issue, and therefore the rules of evidence are not carefully applied, and testimony is liable to be given which is not carefully guarded and may be unconsciously derived from hearsay. Inasmuch as no issue has been framed, the bankrupt or his counsel can not always perceive the inferences which may be drawn from the testimony, and therefore will not produce rebutting facts. The danger in using the information, which has thus been gathered in one of these 'fishing excursions,' as testimony upon which a court can rely in an issue between the bankrupt and his creditors, is such as to render its admission inexpedient. It is liable to produce an injustice, and the testimony may, therefore, be regarded as inadmissible."

be recalled unless the party consents to the use of the testimony as it appears in the proceedings.[4]

Evidence taken before a referee in bankruptcy may be used in civil suits pending in either state or federal courts for the purpose of impeaching a witness. But testimony taken in one proceeding can not be used as evidence in another proceeding except by the consent of parties.[5]

[4] *In re* Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334.

[5] *In re* Rosenberg, 116 Fed. Rep 402, 8 Am. B. R. 624.

CHAPTER XX.

THE BANKRUPT—DUTIES, PROTECTION AND EXTRADITION.

§ 211. Who is a bankrupt.

The word "bankrupt" as used in the bankrupt act is defined to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt." [1]

§ 212. His duty to attend meetings.

The bankrupt must attend the first meeting of his creditors, if directed by the court, or a judge thereof, to do so.[1] But he is not required to attend the first or any subsequent meeting [2] of his creditors unless specially ordered to do so. And in no case can he be required to attend such meeting at a place more than one hundred and fifty miles distant from his home or principal place of business.[3] The bankrupt is entitled to his actual expenses from the estate when required to attend at any place other than the city, town, or village of his residence.[3] But he can not be allowed illegitimate expenses, for gambling and traveling expenses.[4]

It is the duty of the bankrupt to attend the hearing upon his application for a discharge, if filed, without an order of court, or service of notice, or process.[5] He can not object to attending on account of the distance, where the hearing is at the regular place of holding court.

[1] B. A. 1898, Sec. 1, clause 4.

[1] B. A. 1898, Sec. 7, clause 1; *In re* Eagles, 99 F. 695, 3 Am. B. R. 733.

[2] See *In re* Dumahaut, No. 4124 Fed. Cas., 15 Blatch. 20.

[3] B. A. 1898, Sec. 7 (proviso clause).

[4] *In re* Tudor, 100 Fed. Rep. 796, 4 Am. B. R. 78; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

[5] B. A. 1898, Sec. 7, clause 1; *In re* Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.

§ 213. Duty to comply with the orders of the court.

It is expressly made the duty of the bankrupt to comply with all lawful orders of the court.[1] The courts of bankruptcy are empowered to enforce obedience by bankrupts to such orders by fine or imprisonment or by fine and imprisonment.[2]

An order of court "does not mean a written order always, but only an exercise of authority constituting a requirement."[3] Where an order has actually been made by the court including a referee[4] it is binding upon the bankrupt until it is set aside or reversed, even though the court making it is without jurisdiction.[5] It is not for the bankrupt to decide whether the order is lawful or not and then act according to his own decision,[6] or under the advice of counsel.[7] Where a bankrupt has used due diligence to comply with an order of court he is not guilty of contempt.[8] He will not be punished for contempt for refusing to turn over property to his trustee if he shows that the property is not in his possession or under his control.[9]

A person is subject to the orders of a court of bankruptcy whenever he has been duly served with process or a legal notice, or whenever he has voluntarily submitted himself to

[1] B. A. 1898, Sec. 7, clause 2. Compare R. S. Sec. 5104.

[2] B. A. 1898, Sec. 2, clause 13. See Contempt, Chap. XXII.

[3] Bridges v. Sheldon, 7 Fed. Rep. 45.

[4] B. A. 1898, Sec. 1, clause 7, and Sec. 41.

[5] Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; Worden v. Searles, 121 U. S. 14, 30 L. Ed. 853; *In re* Eaton, 51 Fed. Rep. 804.

[6] See Atlantic Giant Powder Co. v. Dittman Co., 9 Fed. Rep. 317.

[7] Burr v. Kimbark, 29 Fed. Rep. 432; U. S. v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Muller, No. 5577 Fed. Cas., 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Western Distilling Co., 42 Fed. Rep. 96.

[8] *In re* Carpenter, No. 2427 Fed. Cas., 1 N. B. R. 299.

[9] Boyd v. Glucklich (C. C. A., 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393; *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re* Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302.

[10] *In re* Harris, 3 N. Y. Leg. Obs. 152.

the jurisdiction of the bankruptcy court. This he may do by filing a petition [10] or by proving a debt [11] or by entering a voluntary appearance.[12]

The statute expressly authorizes a court of bankruptcy to make the order adjudging a person to be a bankrupt; [13] to direct him to attend meetings of creditors [14] and to examine claims,[15] to execute papers,[16] or order him to be arrested and kept in custody,[17] or to appear for examination; [18] and generally to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act.[19] Thus the court may order a bankrupt to deliver to the trustee money or other property, which is properly a part of his assets and apparently in his possession.[20] But such order should not direct a commitment in case of failure to comply with it without giving the defendant a day in court with reference to that part of the order.[21] The different lawful orders which a court of bankruptcy may make with reference to the bankrupt are much too numerous to be collated at this point, even if it were possible to do so. When such an order is made it is the duty of the bankrupt to comply with its terms.

[11] *In re* Kyler, No. 7956 Fed. Cas., 2 Ben. 414.

[12] *In re* Ulrick, No. 14327 Fed. Cas., 3 Ben. 355; *In re* Kirtland, No. 7851 Fed. Cas., 10 Blatch. 515.

[13] B. A. 1898, Sec. 2, clause 1.

[14] B. A. 1898, Sec. 7, clause 1.

[15] B. A. 1898, Sec. 7 (next to last clause).

[16] B. A. 1898, Sec. 7, clause 4.

[17] B. A. 1898, Sec. 9.

[18] B. A. 1898, Sec. 7, clause 9, and Sec. 21*a*.

[19] B. A. 1898, Sec. 2, clause 15.

[20] Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 329, 12 Am. B. R. 178; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299; *In re* Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Felson, 124 Fed. Rep. 288, 10 Am. B. R. 716.

[21] *In re* Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302; *In re* Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; *In re* Hershkowitz, 136 Fed. Rep. 950, 14 Am. B. R. 86.

§ 214. Duty with respect to claims against his estate.

It is made the duty of the bankrupt to examine the correctness of all proofs of claims filed against his estate.[1] But he can not be required to examine them except when presented to him, unless ordered by the court, or a judge thereof, for cause shown.[2] In case any person has to his knowledge proved a false claim against his estate it is his duty to disclose that fact immediately to his trustee.[3] In fact, it is his duty immediately to inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of the act, coming to his knowledge.[4]

§ 215. Duty to execute papers.

It is the duty of the bankrupt to execute and deliver such papers as may be ordered by the court.[1] Under this provision the court may order the bankrupt to execute and deliver to the trustee the proper papers, to enable him to prosecute or defend suits pending in the state courts, in his own name in the same manner and with the like effect as they might have been prosecuted or defended by the bankrupt.[2]

As the bankrupt statute has no extra-territorial effect, real estate situated in a foreign country does not vest in the trustee by virtue of the act.[3] It is therefore made the duty of the bankrupt to execute to his trustee transfers of all of his property in foreign countries.[4]

§ 216. Duty to prepare a schedule of his debts and assets.

For the purpose of advising the court, its officers and persons interested in his estate, the bankrupt is required to file

[1] B. A. 1898, Sec. 7, clause 3.

[2] B. A. 1898, Sec. 7 (last clause but one).

[3] B. A. 1898, Sec. 7, clause 7; *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

[4] B. A. 1898, Sec. 7, clause 6.

[1] B. A. 1898, Sec. 7, clause 4. Compare R. S. Sec. 5051.

[2] See *In re* Clark, No. 2798 Fed. Cas., 4 Ben. 88; Clark v. Binninger, 39 How. Prac. 363; Samson v. Burton, No. 12285 Fed. Cas., 5 Ben. 325.

[3] Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Poole, 23 Texas, 517.

[4] B. A. 1898, Sec. 7, clause 5.

a statement of his financial condition. The act makes it his duty to "prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee." [1]

The requisites of a schedule are further considered in connection with the proceedings in voluntary and involuntary bankruptcy.[2]

§ 217. Duty to submit to an examination.

It is made the duty of the bankrupt, when present at the first meeting of his creditors, and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.[1] This subject is further considered in another place.[2]

§ 218. Protection from arrest.

A bankrupt is exempt from arrest upon civil process except in the following cases: *First*, when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; *second*, when issued from a state court having jurisdic-

[1] B. A. 1898, Sec. 7, clause 8.

[2] In voluntary bankruptcy, Chap. IX, *ante;* in involuntary bankruptcy, Chap. X, *ante;* in bankruptcy of partnership, Chap. XI, *ante*. See also *In re* Soper, 1 Am. B. R. 193; Gen. Ords. V and IX.

[1] B. A. 1898, Sec. 7, clause 9.

[2] See Examination of the Bankrupt, Chap. XIX, *ante*.

tion, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release; and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.[1]

The object of this provision is obviously to protect a bankrupt from arrest in a suit founded on a debt from which a discharge in bankruptcy will be a release.[2] A court of bankruptcy has no power to cause the arrest of a bankrupt for debt. A state court can cause the arrest of a bankrupt only on judgments not affected by bankruptcy proceedings, when such arrest is permitted by laws of the state where the process is issued and served.[3] In such cases he is exempt from such arrest when in attendance upon a court of bankruptcy or en-

[1] B. A. 1898, Sec. 9*a*, Gen. Ord. 30. Compare R. S. Sec. 5107. *In re* Dresser, 124 Fed. Rep. 915, 10 Am. B. R. 270; *In re* Lewensohn, 99 Fed. 73, 3 Am. B. R. 594; affirmed in 104 Fed. Rep. 1006, 44 C. C. A. 309.

[2] Barrett v. Prince (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 16 Am. B. R. 64.

Gen. Ord. 30 provides for the release if a debtor is committed after the filing of his petition upon process in any civil action founded upon a *claim provable in bankruptcy*. It is clear that claims may be provable in bankruptcy which are not released by discharge. In this respect the general order must give way to the terms of the statute. This was the interpretation of general order 27 under the act of 1867, from which the language of general order 30 is evidently taken. *In re* Glaser, No. 4574 Fed. Cas., 2 Ben. 180, it was held that the provisions of general order 27, so far as they authorize the discharge, from arrest or imprisonment, of a bankrupt arrested on process founded on a claim provable in bankruptcy, where the claim was one from which his discharge in bankruptcy will not release him, were not warranted by the bankruptcy act of 1867.

That the bankrupt can not be released from imprisonment if the arrest is based upon any debt from which a discharge would not be a release, consult *In re* Kimball, No. 7767 Fed. Cas., 2 Ben. 38; *In re* Whitehouse, No. 17564 Fed. Cas., 1 Low. 429; *In re* Migel, No. 9538 Fed. Cas., 2 N. B. R. 481; *In re* Kimball, No. 7769 Fed. Cas., 6 Blatch. 292, affirming No. 7768 Fed. Cas., 2 Ben. 554; *In re* Seymour, No. 12684 Fed. Cas., 1 Ben. 348; *In re* Robinson, No. 11939 Fed. Cas., 6 Blatch. 253; *In re* Patterson, No. 10817 Fed. Cas., 2 Ben. 155; *In re* Williams, No. 17700 Fed. Cas., 2 Biss. 233.

[3] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

gaged in the performance of duty imposed by the bankruptcy act. A bankrupt is not protected from arrest on execution on a judgment for costs rendered against him in a state court after adjudication in bankruptcy.[4]

The protection of a debtor from arrest upon civil process is co-extensive, in point of time, with the proceedings in bankruptcy. The exemption is limited to bankrupts. The protection begins as soon as the debtor is deemed bankrupt under the statute. The act itself defines the word "bankrupt" to "include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt.[5] It is therefore clear that it is not necessary that the debtor shall have been adjudged a bankrupt. The protection from arrest begins immediately upon filing a petition, either in voluntary or involuntary bankruptcy. It extends during the whole period of the pendency of the proceedings in bankruptcy.[6] The debtor is not entitled to protection from arrest, or to relief if arrested, by virtue of the provision quoted above, after the termination of the proceedings for discharge.[7]

The protection of a bankrupt is expressly stated to be an exemption from arrest upon civil process. The exemption extends to arrests upon any civil process. There is no distinction between an arrest on mesne and final process.[8] But there is nothing in the statute to prevent a bankrupt being arrested and imprisoned upon criminal process.[9]

The protection afforded a bankrupt, by Section 9 of the act, does not apply, where the arrest was made prior to the commencement of the bankruptcy proceedings, although he

[4] *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

[5] B. A. 1898, Sec. 1, clause 4.

[6] *In re* Lewensohn, 99 Fed. Rep. 73, 3 Am. B. R. 504; affirmed, 104 Fed. Rep. 1006, 44 C. C. A. 309.

[7] *In re* Kimball, No. 7768 Fed. Cas., 2 Ben. 554, 6 Blatch. 292; see also *In re* Dole, No. 3964 Fed. Cas., 11 Blatch. 499.

[8] *In re* Wiggers, No. 17623 Fed. Cas., 2 Biss. 71; *In re* Mifflin, 1 Penn. Law Jour. 146.

[9] See Stockwell v. Silloway, 105 Mass. 517.

may be in custody, or in prison after the petition is filed.[10] It is a bankrupt, and not a debtor, who is exempt from arrest. The bankrupt is exempt from arrest only and not from imprisonment. Section 9, therefore, does not authorize a court of bankruptcy to release a bankrupt from custody or imprisonment where he was arrested prior to the filing of the petition.[10] Where the arrest is made after the petition is filed, the court may release him on a writ of *habeas corpus.*[11] A bankrupt out on bail is deemed under arrest, to all intents and purposes, the same as if he had not been released upon bail.[12] He may be surrendered to the jailor by his bail. A court of bankruptcy can not, in such case, order his release. So also the restoring a debtor to confinement, from which he had obtained a temporary relief, pending an appeal, is not an arrest within the meaning of the clause under consideration.[13] And a jailor has the right to pursue a bankrupt, who has escaped, and retake him. Such a person is still, in law, and for the benefit of the jailor, considered to be in custody.[14]

§ 219. When a bankrupt may be arrested.

A bankrupt may be arrested upon a criminal process issued from a court of bankruptcy, or other court of the United States, or a state court. His exemption is limited to arrests

[10] *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812; *In re* Walker, No. 17060 Fed. Cas., 1 Low. 222; Hazelton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270; Minon v. Van Nostrand, No. 9542 Fed. Cas., 1 Low. 458, affirmed in No. 9641 Fed. Cas., Holmes 251; *In re* Cheney, No. 2636 Fed. Cas., 5 Law Rep. 19; *In re* Rank, No. 11566 Fed. Cas., Crabbe, 493; *In re* Hoskins, No. 6712 Fed. Cas., Crabbe, 466; Bank v. Hatch, 57 N. H. 460; Hussey v. Danforth, 77 Me. 17.

But see People v. Erlanger, 132 Fed. Rep. 883, 13 Am. B. R. 197.

[11] Sec. 220, *post.*

[12] *In re* Cheney, No. 2636 Fed. Cas., 5 Law Rep. 19; Hazleton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270; *In re* Rank, No. 11566 Fed. Cas., Crabbe, 493; Stockwell v. Silloway, 100 Mass. 287. But see Foxall v. Levi, No. 5015 Fed. Cas., 1 Cranch. C. C. 139; Lingan v. Bayley, No. 8370 Fed. Cas., 1 Cranch, C. C. 112.

[13] Stockwell v. Silloway, 100 Mass. 287.

[14] Anderson v. Hampton, 1 B. & Ald. 308.

on civil process.[1] Power is expressly conferred upon the courts of bankruptcy,[2] and the circuit courts,[3] to arraign, try, and punish bankrupts for violations of the bankrupt statute. There is no limitation or restriction upon state courts with respect to arrests or punishment of bankrupts convicted of crimes or misdemeanors under the state laws.[4]

A bankrupt may be arrested upon civil process, either mesne or final, in three classes of cases.

First: For Contempt.—A bankrupt may be arrested upon civil process, when issued from a court of bankruptcy, for contempt or disobedience of its lawful orders.[5] This includes contempt committed before a referee and the disobedience of a lawful order, process, or writ of a referee.[6] The power to enforce obedience by bankrupts to all lawful orders, by fine or imprisonment, or by fine and imprisonment, is expressly conferred upon courts of bankruptcy.[7] Thus, the bankrupt is brought, at all times, within the control and disposition of the court.

Second: Upon a Debt not Released by a Discharge.—A bankrupt may be arrested upon civil process, issued from a state court having jurisdiction, and served within such state, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he is exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act.[8] Such arrests can be made only in states where such proceedings are authorized by the state law.

In order that a bankrupt may be arrested on civil process

[1] B. A. 1898, Sec. 9.

[2] B. A. 1898, Sec. 2, clause 4, and Sec. 29.

[3] B. A. 1898, Sec. 23*c*.

[4] See Stockwell v. Silloway, 105 Mass. 517.

[5] B. A. 1898, Sec. 9*a*.

[6] B. A. 1898, Sec. 41*a*, and Sec. 2, clause 16.

"Its" equals "court's" and is defined to "mean the court of bankruptcy in which the proceedings are pending, and may include the referee." B. A. 1898, Sec. 1, clause 7.

[7] B. A. 1898, Sec. 2, clauses 13 and 16.

[8] B. A. 1898, Sec. 9*a*; *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

issued by a state court, *first,* it must be served within the state in which the court issuing is held; and, *second,* the suit must be founded upon a debt or claim from which a discharge in bankruptcy will not release him. The statute provides[9] that "a discharge in bankruptcy shall release a bankrupt from all his provable debts,[10] except such as, *first,* are due as a tax levied by the United States, the state, county, district or municipality in which he resides; *second,* are liabilities for obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or criminal conversation; *third,* have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or, *fourth,* were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Where the debt is one from which a discharge will not release the bankrupt, and the process is served within the state in which the court is held, he can not be relieved by a court of bankruptcy.[11] This rule is subject to an important exception, namely, that a bankrupt can not be arrested when in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act.[12] The exemption is not restricted to particular occasions when the bankrupt's physical attendance in court is required, or he is actually engaged upon

[9] B. A. 1898, Sec. 17. What debts are not discharged are further considered in another place. See Secs. 288, *et seq., post.*

[10] As to what debts are provable, see Chap. XIII.

[11] *In re* Marcus (C. C. A., 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365; *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Glaser, No. 5474 Fed. Cas., 2 Ben. 180; *In re* Kimball, No. 7767 Fed Cas., 2 Ben. 38; *In re* Seymour, No. 12684 Fed. Cas., 1 Ben. 348; *In re* Patterson, No. 10817 Fed. Cas., 2 Ben. 155; *In re* Pettis, No. 11046 Fed. Cas., 7 Am. Law Reg. 695; Harter v. Harlan, 2 N. B. R. 238; *In re* Devoe, No. 3843 Fed. Cas., 1 Low. 251; *In re* Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116.

[12] B. A. 1898, Sec. 9*a*, clause 2.

some required duty and the court may release him from arrest upon his furnishing bond to obey the orders of the court and not depart from the jurisdiction during the continuance of such exemption.[13]

THIRD: FOR AN EXAMINATION.—A bankrupt may be arrested, under certain circumstances, and held in custody for purposes of examination. The statute provides "the judge may at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination." [14]

It will be observed that this provision providing for the arrest and detention of a bankrupt is quite limited. There is no provision for the seizure of property. The bankrupt can only be arrested when he is about to leave the district to avoid an examination and thereby defeat the proceedings. It has been held that an order can not be made after the bankrupt has actually fled from the district as a ground for an order of extradition.[15] If he is about to depart for other purposes, such as to better his condition, it would seem that this provision would not apply to him. The warrant must be issued within one month after the qualification of the trustee. He can not be held in custody more than ten days, and can not be imprisoned during that period.

Proceedings for a warrant are properly instituted by a petition or motion supported by affidavits or depositions of at least two persons. The prayer should not be included in

[13] *In re* Dresser, 124 Fed. Rep. 915, 10 Am. B. R. 270; *In re* Lowensohn, 99 Fed. Rep. 73, 3 Am. B. R. 594; affirmed 104 Fed. Rep. 1067, 44 C. C. A. 309.

[14] B. A. 1898, Sec. 9*b*. Compare R. S. Sec. 5024.

[15] *In re* Hissenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

[16] *In re* McKibben, No. 8859 Fed. Cas., 12 N. B. R. 97; *In re* Hadley, No. 5894 Fed. Cas., 12 N. B. R. 366.

the petition in bankruptcy, but should be a separate motion or petition.[16] The affidavits or depositions should show the facts, and not mere opinions or belief of the affiants or deponents. The material facts should be stated upon personal knowledge, and not upon information and belief.[17]

Satisfactory proof of this character must be introduced to show, *first*, that the bankrupt is about to leave the district in which he resides or has his principal place of business;[18] *second*, that he is leaving the district to avoid examination; and, *third*, that his departure will defeat the proceedings in bankruptcy.

The court will probably admit counter affidavits to be filed by the bankrupt, if he desires to take issue with the petitioning creditors. This was manifestly the intent of congress. It is provided that the warrant issue only "upon satisfactory proof," and also, "if upon hearing the evidence of the parties it shall appear to the court or judge thereof that the allegations are true, and that it is necessary, he shall order the marshal," etc. This implies that evidences may be introduced by both parties, and that a hearing shall be had. The intent of congress, with reference to the arrest and detention of a bankrupt, as gathered from the whole provision, is not to permit persecution of the bankrupt or a detention for an unreasonable time, nor an arrest, unless the proof shows conclusively the three elements mentioned above. At least a bankrupt is entitled to a hearing before he is ordered to be kept in custody.

The affidavits or depositions may be taken before a referee; an officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country,

[17] *In re* McKibben, No. 8859 Fed. Cas., 12 N. B. R. 97; *In re* Hadley, No. 5894 Fed. Cas., 12 N. B. R. 366.

[18] As to the meaning of the words "about to leave," consult Jackson v. Burke, 4 Heiskell (Tenn.) 614; Meyers v. Farrell, 47 Miss. 283; Elliott v. Keith, 32 Mo. App. 585; Bennet v. Avant, 2 Sneed (Tenn.) 152.

Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for making of a false oath.[19]

"If upon hearing the evidence of the parties it shall appear to the court or the judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto." [20] The arrest is in no manner for security or satisfaction of a creditor's debt. It is simply to secure the attendance of the respondent from time to time, for a period of ten days, as the court shall order, for an examination. It is to that purpose and no other that bail is required of him.[20]

§ 219a. Ne Exeat.

Owing to the very limited power of detention under Section 9*b*, it may be necessary to resort to a writ of *ne exeat* to prevent persons departing from the jurisdiction. A court of bankruptcy may issue a writ of *ne exeat* to restrain a bankrupt from departing out of the jurisdiction of the court,[1] whenever it may be necessary for the enforcement of the provisions of the bankrupt act.

§ 220. Proceedings to release a bankrupt from imprisonment—Habeas corpus.

A bankrupt may apply to a court of bankruptcy for a release from imprisonment, when he has been arrested after

[19] B. A. 1898, Sec. 20.

[20] B. A. 1898, Sec. 9*b*; *In re* Sheehan, No. 12737 Fed. Cas., 8 N. B. R. 345.

[1] B. A. 1898, Sec. 2, cl. 15; R. S. Sec. 717. *In re* Cohen, 136 Fed. Rep. 999, 14 Am. B. R. 355; *In re* Lipke, 98 Fed. Rep. 970, 3 Am. B. R. 569; Hoffschlaeger Co. v. Young Nap. 12 Am. B. R. 510.

the commencement of proceedings in bankruptcy.[1] It is immaterial whether the process for arrest was issued by a state or a federal court. It has been held that when the arrest is made by a state court the application for release should be made to that court, in order to avoid a conflict of jurisdiction.[2] The refusal of a state court to grant a release can not be considered as final and binding.[3] It is the duty of the court of bankruptcy to see that a suitor within its jurisdiction is protected in the manner contemplated by law. After a bankrupt has received his discharge in bankruptcy, the state court will, ordinarily, upon proper application, release him from arrest,[4] or the bankrupt may apply to the court of bankruptcy.[5] A court of bankruptcy of one district may enjoin a creditor from proceeding with an arrest made in another district, if the creditor is within the jurisdiction of the court making the order.[6]

The proper course to pursue is to apply for a writ of *habeas corpus*.[7] The application for a writ is regularly made to the judge of the bankruptcy court by a petition signed by the bankrupt, for whose relief it is intended, setting forth the facts concerning the detention of him, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint should be verified by the oath of the person making the application.

The judge, to whom the application is made, will award a writ of *habeas corpus*, unless it appears from the petition

[1] *In re* Glaser, No. 5474 Fed. Cas., 2 Ben. 180; *Ex parte* Miflin, No. 9537 Fed. Cas., 1 Penn. Law J. 146; *In re* Winthrop, No. 17900 Fed. Cas., 5 Law Rep. 24; U. S. v. Dobbins, No. 14971 Fed. Cas., 5 Law. Rep. 81; *In re* Wiggers, No. 17623 Fed. Cas., 2 Biss. 71.

[2] *In re* O'Mara, No. 10509 Fed. Cas., 4 Biss. 506; *In re* Migel, No. 95387 Fed. Cas., 2 N. B. R. 481.

[3] *In re* Wiggers, No. 17623 Fed. Cas., 2 Biss. 71; *In re* Williams, No. 17700 Fed. Cas., 6 Biss. 233.

[4] Jones v. Emerson, 1 Caines (N. Y.) 487; Comstock v. Grout, 17 Vt. 512.

[5] *In re* Simpson, No. 12879 Fed. Cas., 2 N. B. R. 47.

[6] Hazelton v. Valentine, No. 6287 Fed. Cas., 1 Low. 270.

[7] *Ex parte* Williams, No. 17700 Fed. Cas., 6 Biss. 233.

itself that the party is not entitled to it.[8] The writ, so issued, is directed to the person in whose custody the party is detained. The person to whom the writ is directed makes a return of it by certifying the true cause of the detention of the bankrupt. He then brings the bankrupt before the judge who granted the writ. A day is set for the hearing of the case. At this hearing the bankrupt may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Such denials or allegations should be made under oath. The return and all other suggestions made against it may be amended by the leave of the court before or after they are filed, so that thereby the material facts may be ascertained. The court or judge proceeds in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice requires.

Where the arrest is made upon process issued from a state court it is not clear how far a court of bankruptcy will go behind the face of the papers, if it all, to determine the questions of fact on which the petitioner's right to discharge or the creditor's right to continue the imprisonment depends. The statute contains no directions as to the specific evidence required. There is a conflict of authority on this point in the decision under the act of 1867.

Some judges were of the opinion that the scope of inquiry should be limited to the question whether the state court had founded its arrest on a claim, which, on the face of the papers which were filed before it as the foundation for the arrest, was a claim from which the debtor would not be discharged in bankruptcy.[9] The theory of this position was that the complaint or affidavits and facts stated therein in the state proceedings were binding upon the bankruptcy court.

[8] *Ex parte* Milligan, 4 Wall. 110, 18 L. Ed. 281.

[9] *In re* Valk, No. 16814 Fed. Cas., 3 Ben. 431; *In re* Robinson, No. 11939 Fed. Cas., 6 Blatch. 253; *In re* Kimball, No. 7768 Fed. Cas., 2 Ben. 554, affirmed in No. 7769 Fed. Cas., 6 Blatch. 292; *In re* Devoe, No. 3843 Fed. Cas., 1 Low. 251.

Judge Bradford, after referring to the cases tending to limit the scope of the inquiry, aptly observed: [10]

"Where the liberty of the prisoner depends upon the fact that his debt is dischargeable by his discharge in bankruptcy, and he tenders proof to maintain the allegation, is it not a strange proposition that he shall be denied the right to prove his right to release from imprisonment, because an *ex parte* affidavit has been made in the state courts that he had contracted the debt under such circumstances of fraud as that his debt would not be released by his discharge in bankruptcy? This appears strange, because it affects the personal liberty of the bankrupt. But the rights of the creditors to arrest for debts not dischargeable in bankruptcy are equally sacred, and the proposition to me is equally strange that they should be denied the power to hold under arrest one legally arrested for other reasons filed than those which will release the debt, when they make the allegation, and offer to sustain it by proof, that the petitioner can not bring himself within the exemption from arrest granted by congress, by reason of the fact that the debt on which he was arrested was contracted in fraud."

On the other hand, there were judges who thought that it was the duty of the court of bankruptcy to examine diligently all legal evidence brought before it, from any quarter whatever, tending to show that a debt not dischargeable by the discharge of the bankrupt, had or had not been contracted.[11] The theory of this position was that the cases in which the bankrupt was exempt from arrest, and also cases in which the creditor was entitled to have his imprisonment continued, were expressly stated in the bankrupt law. The liability to imprisonment or immunity from the same de-

[10] *In re* Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116.

[11] *In re* Williams, No. 17700 Fed. Cas., 6 Biss. 233; *In re* Alsberg, No. 261 Fed. Cas., 16 N. B. R. 116; *In re* Glaser, No. 5474 Fed. Cas., 2 Ben. 180; *In re* Kimball, No. 7767 Fed. Cas., 2 Ben. 38. Judge Blatchford, who decided these last two cases, afterwards expressly disapproved of his decision in these cases. See *In re* Kimball, No. 7768 Fed. Cas., 2 Ben. 554.

pended upon whether the debt, for which the bankrupt was arrested by the state authority, was dischargeable or not by the discharge in bankruptcy. It did not depend in any degree upon the reason or ground of arrest given in the affidavits filed in the state court. What was the nature of the debt, upon which the arrest was founded, was deemed a question which the bankruptcy court had a right to determine. The bankrupt law being paramount, and giving exclusive jurisdiction to the bankruptcy court, it was considered the duty of that court to see that a suitor within its jurisdiction was protected in the manner contemplated by law. The statements made in a declaration or complaint or affidavit filed in a state court were therefore held not to be binding upon the court of bankruptcy.

It should be observed, however, that where a judgment has been rendered in an action for fraud in a state court, the bankruptcy court is bound by the judgment.[12] The bankruptcy court will not reverse the finding of a state court. In such cases the court will look to the record of the state court to see if material and traversable allegations of fraud appear, which must have been found true in order to render the judgment.

When a bankrupt is arrested upon civil process, issuing from a court of bankruptcy, pending bankruptcy proceedings, the order of the court should be to release the prisoner. The only exception to this rule is when the arrest and commitment is for contempt or disobedience of its lawful orders.

When the bankrupt is arrested, by the authority of the state law, and claims immunity and privilege from arrest, he must make it appear to the satisfaction of the court that his case comes within the exemption or privilege granted. If he does, he should be discharged from arrest.[13] If he does not, he

[12] *In re* Patterson, No. 10817 Fed. Cas., 2 Ben. 155; *In re* Whitehouse, No. 17564 Fed. Cas., 1 Low. 429; Shuman v. Strauss, 52 N. Y. 404.

[13] Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R. 80.

should be remanded into custody.[14] If he makes it appear that his debt is dischargeable; that is, that it is not tainted with any of the kinds of frauds enumerated in Section 17 of the act, which prevent its being released by the discharge of the bankrupt, or if the arrest was made when he was in attendance upon a court of bankruptcy, or engaged in the performance of a duty imposed by the act, he is within the exemptions extended by Section 9. If he can not do this, he is not within the privilege or exemption, and must be remanded into custody.

If a court of bankruptcy orders the release of a bankrupt in custody of a state officer, such officer is obliged to release him and can not be punished therefor by the state court.[15]

§ 221. Extradition of bankrupts.

Whenever a warrant for the apprehension of a bankrupt has been issued, and he is found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction to another.[1]

The extradition of a bankrupt may be required when a warrant is issued for his arrest, in case he is accused of or indicted for an offense under the bankrupt act, or in case he is charged with contempt, or for the purpose of detaining him for any examination. In order to support extradition proceedings it is necessary that a warrant shall have been issued for his arrest, and that he be found beyond the jurisdiction of the court issuing it and within the jurisdiction of another court of bankruptcy. Proceedings in extradition

[14] *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812; *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 5 Am. B. R. 365.

[15] *In re* Kimball, No. 7767 Fed. Cas., 2 Ben. 38; *Ex parte* Hurst, No. 6924 Fed. Cas., 1 Wash. C. C. 186, 4 Dall. 387; Lyell v. Goodwin, No. 8616 4 McLean 29; Thomas v. Hudson, 13 Mees. & W. 353, 816, 884; Norton v. Walker, 3 Ex. 480.

[1] B. A. 1898, Sec. 10 and Sec. 2, clause 14; *In re* Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

cases, under a treaty between the United States and a foreign government, stand on a wholly different footing.[2] Such proceedings are not expressly adopted by the bankrupt act.

The bankrupt statute adopts the provisions relating to transferring a person under an indictment, from one district to another. The only authority for holding a person under indictment, to bail in one district to answer in another district, or upon his failure to give bail to order him to be removed into another district where the offense is to be tried, is found in Section 1014 of the Revised Statutes. This provision is as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such a court, together with the recognizance of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

When a warrant for the arrest of a bankrupt has been issued, and he is found in another district, he may be reached by proceedings under this section. He may be arrested there

[2] R. S. Secs. 5270-5280; *In re* Henrich, No. 6369 Fed. Cas., 5 Blatch. 414; *In re* Manning, 44 Fed. Rep. 275.

and transferred in the usual manner under this section. He can not, however, be arrested upon the warrant originally issued, because it will not run into another district.[3] All proceedings for arrest, bail, commitment and removal are held in the district in which the bankrupt is found, and not in the district in which the original warrant was issued.[4]

§ 222. Proceedings to remove a bankrupt from one district to another.

The proceeding contemplated in Section 1014 is an original and independent proceeding in the district where the bankrupt is found. It is based upon the order of court for a warrant or upon an indictment previously issued by the court having jurisdiction of the cause. The section expressly provides that the proceeding shall be "agreeably to the usual mode of process against offenders in such state." It seems that the effect of the section is to adopt the familiar common law proceeding upon complaint for the arrest and commitment of offenders by the committing magistrates, subject to this provision, adopting procedure of the several states, which is, of course, itself subordinate to the provisions of the constitution of the United States.[1] Although the procedure is not exactly the same in all states, it is substantially so.

§ 223. Proceedings before a United States commissioner.

The proceedings are regularly instituted by a complaint under oath, made before a United States commissioner,[1] or any magistrate mentioned in Section 1014. The oath may be made by any person having knowledge of the facts.

[3] *Ex parte* Graham, No. 5657 Fed. Cas., 3 Wash. C. C. 456; *In re* Manning, 44 Fed. Rep. 275; *In re* Dana, 68 Fed. Rep. 886.

[4] *In re* Dana, 68 Fed. Rep. 886; *In re* Manning, 44 Fed. Rep. 275; *In re* Burkhardt, 33 Fed. Rep. 25; U. S. v. Fowkes, 49 Fed. Rep. 50, affirmed, 53 Fed. Rep. 13, 3 C. C. A. 394; U. S. v. Brawner, 7 Fed. Rep. 86.

[1] West v. Cabell, 153 U. S. 87, 38 L. Ed. 643, U. S. Const., 4th Amend't.

[1] For form of complaint, see Loveland's Forms of Federal Practice, No. 871.

Ordinarily, a certified copy of the indictment or the order of court, and a warrant furnished to the United States attorney for the district in which the bankrupt is found, is sufficient to justify a referee in bankruptcy or other person making the required affidavit. Thereupon the commissioner issues a warrant, directed to the marshal of the district, commanding him to arrest the bankrupt and bring him before a committing magistrate. A commissioner is not authorized to issue a warrant except upon a complaint on oath.[2] The oath should be made within the district. An indictment found by a grand jury, or an information or an order of court, in another district, is not such a complaint on oath as is required to authorize a warrant for arrest.[3]

The bankrupt is then arrested and brought before the commissioner. He thereupon pleads. If his plea is guilty he should be held to bail or committed. If his plea is not guilty he may waive examination or demand a hearing. Unless he waives examination he is entitled to a speedy hearing. At the examination before the commissioner evidence may be introduced for and against the bankrupt and counsel may be heard. The magistrate must determine the identity of the prisoner, and his probable guilt. If he is satisfied as to these two questions, it is his duty to admit the bankrupt to bail for trial before such court, as by law is cognizant of the offense.[4] If the bankrupt fails to tender a sufficient bail, the magistrate may then commit him to the custody of the marshal to await a warrant for his removal. If, on the other hand, there is no probable cause of his guilt or his identity is not established, the bankrupt is entitled to be discharged by the commissioner. When the bankrupt is discharged or admitted to bail by the magistrate, extradition

[2] The fourth amendment to the constitution of the United States provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation." See U. S. v. Tureaud, 20 Fed. Rep. 621.

[3] Bagnall v. Ableman, 4 Wis. 184. For form of warrant, see Loveland's Forms of Federal Practice, No. 871.

proceedings are at an end. Further steps are necessary only when the bankrupt is committed to custody.[4]

An Indictment as Evidence.—An indictment in a federal court is *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found.[5]

The extent to which a commissioner in extradition may inquire into the validity of an indictment by any evidence before him as proving the probable guilt has never been definitely settled, although the supreme court has held that technical objections should not be considered and that the legal sufficiency of the indictment is only to be determined by the court in which it is found.[6]

In *Benson* v. *Henkel*[7] the supreme court said: "Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a federal court of another district, and subject to be passed upon by such court on demurrer or otherwise. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another district from that to which the extradition is sought, the commissioner could not probably consider it as ground for removal. In such cases resort must be had to other evidence of probable cause.

"While the principal laid down in some of the earlier cases in this court, that an indictment upon a statute is ordinarily

[4] U. S. v. Jacobi, No. 15460 Fed. Cas., 1 Flip. 108; *In re* Bailey, No. 730 Fed. Cas., 1 Woodlw. 422; U. S. v. Shepard, No. 16273 Fed. Cas., 1 Abb. U. S. 431.

[5] Beavers v. Henkel, 194 U. S. 73, 48 L. Ed. 882.

[6] Benson v. Henkel, 198 U. S. 1, 49 L. Ed. 919; Beavers v. Haubert, 198 U. S. 77, 49 L. Ed. 919; Roberts v. Reilly, 116 U. S. 80, 96, 29 L. Ed. 544; Greene v. Henkel, 183 U. S. 249, 260, 46 L. Ed. 177; *Ex parte* Reggel, 114 U. S. 642, 650, 29 L. Ed. 250; Horner v. United States, No. 2, 143 U. S. 570, 577, 36 L. Ed. 266; Beavers v. Henkel, 194 U. S. 73, 87, 48 L. Ed. 882.

[7] 198 U. S. 1, 49 L. Ed. 919.

sufficient if framed in the language of the statutes has been somewhat qualified in later cases, the rule still holds good that where the statute contains every element of the offense, and an indictment is offered in evidence before the extradition commissioner as proof of probable cause, it is sufficient if framed in the language of the statute with the ordinary averments of time and place, and with such a description of the fraud, if that be the basis of the indictment, as will appraise an intelligent man of the nature of the accusation, notwithstanding that such indictment may be open to motion to quash or motion in arrest of judgment in the court in which it was originally found. An extradition commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint or the indictment offered in support thereof contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case."

§ 224. Proceedings before the judge for an order of removal.

When the bankrupt has been committed to the custody of the marshal, the United States attorney appears before the judge,usually attended by the marshal with the prisoner, and makes an application for an order or a warrant of removal. This should be done as soon as possible after the commitment by the commissioner.

The order or warrant of removal is not issued as a matter of course. It is the duty of the judge to determine judicially whether the prisoner ought to be taken to another district for trial or whether he is entitled to his freedom. The practice in the several districts is not uniform as to how far the judge will go in his inquiry before he takes action in the shape of an order, either granting or refusing the transfer of the prisoner. He must, in any case, be satisfied with the proof of the identity of the prisoner. And if no opposition

is made he may rely upon the finding of the commissioner in respect to probable cause of guilt. But he is not obliged to do so. The judge may allow an examination *de novo* before him upon the facts to determine this question.[1] At such a hearing it seems to be not only the right but the duty of the judge to look into the indictment and probably into an order of court so far as to be satisfied that an offense is charged, which may be lawfully tried in the forum to which it is claimed the accused should be removed.[2]

§ 225. The order of court granting or refusing a warrant.

If the judge is satisfied with the proof of the identity of the prisoner and of the probable cause of his guilt, he issues an order or warrant for removal.[1] This warrant is directed to the marshal of the district within which the prisoner is found and the extradition proceedings had. It commands him to remove the prisoner to the particular district where the offense is to be tried and deliver him to the United States marshal of the district or some other proper officer authorized to receive the prisoner. Only one writ or warrant is necessary to remove a prisoner from one district to another.[2] A marshal of the district where the prisoner is found may deputize the marshal of the district in which the trial is to be held to execute the warrant of removal.[3]

If upon the hearing it appears that the removal should not be made, the judge will refuse the warrant and order the prisoner discharged.[4] He may admit the party to bail, and

[1] *In re* Dana, 68 Fed. Rep. 886; *In re* Wolf, 27 Fed. Rep. 606.

[2] Horner v. U. S., 44 Fed. Rep. 677, 143 U. S. 214, 36 L. Ed. 126; Callan v. Wilson, 127 U. S. 540, 32 L. Ed. 223; *In re* Palliser, 136 U. S. 261, 34 L. Ed. 514; *In re* Terrell, 51 Fed. Rep. 213; *In re* Doig, 4 Fed. Rep. 193; U. S. v. Brawner, 7 Fed. Rep. 86; U. S. v. Rogers, 23 Fed. Rep. 658.

[1] For form of warrant, see Loveland's Forms of Federal Practice, No. 872.

Horner v. U. S. 143, U. S. 207, 36 L. Ed. 126; *In re* Burkhardt, 33 Fed. Rep. 25; U. S. v. White, 25 Fed. Rep. 716.

[2] R. S. Sec. 1029.

[3] U. S. v. Fletcher, 147 U. S. 664, 37 L. Ed. 322.

[4] *In re* Dana, 68 Fed. Rep. 886; U. S. v. Rogers, 23 Fed. Rep. 658.

should do so if the party can furnish bail, and to this end he may reduce or increase the bail fixed by the commissioner.[5]

§ 226. Habeas corpus.

If a bankrupt is unlawfully held in custody he may be released upon a writ of *habeas corpus*.[1] General order 30 provides that if the debtor is "committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been isssued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order."

This general order, like general order 27 under the act of 1867, provides for a release when the debtor is committed in a civil action founded upon a claim *provable in bankruptcy* instead of claims *released by a discharge* as provided by the statute.[2] In this respect the order and statute conflict, and the statute must control.[3]

§ 227. Abatement.

The death or insanity of a bankrupt does not abate the proceedings, but the same are conducted and concluded in the

[5] U. S. v. Brawner, 7 Fed. Rep. 86; U. S. v. Rogers, 23 Fed. Rep. 661; *In re* Wolf, 27 Fed. Rep. 615.

[1] Gen. Ord. 30; *In re* Terrell, 51 Fed. Rep. 213; U. S. v. Fowkes, 49 Fed. Rep. 50, affirmed in 53 Fed. Rep. 13, s. c. 3 C. C. A. 394. In Bagnall v. Ableman, 4 Wis. 163, a writ was granted by a state court releasing a prisoner in the custody of a U. S. marshal.

[2] B. A. 1898, Sec. 9*a*. Compare Sec. 26 of the act of 1867, R. S. Sec. 5107.

[3] See Protection from arrest, Sec. 218, note 2, *ante*.

same manner, so far as possible, as though he had not died or become insane. *Provided*, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence.[1] Proceedings do not abate where a bankrupt died after the filing of a petition and before the return day.[2] In such cases time may be allowed the administrator and creditors to appear and answer the petition.[2] Proceedings do not abate, where a corporation, pending bankruptcy proceedings against it, is dissolved by a state court.[3]

The death or removal of a trustee does not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.[4]

[1] B. A. 1898, Sec. 8. As to practice in case of insanity of bankrupt, see *In re* Burka, 107 Fed. Rep. 674, 5 Am. B. R. 843; *In re* Eisenberg, 117 Fed. Rep. 786, 8 Am. B. R. 551; *In re* Miller, 133 Fed. Rep. 1017, 13 Am. B. R. 345.

[2] *In re* Hicks, 107 Fed. Rep. 910, 6 Am. B. R. 182; *In re* Spalding (C. C. A. 2d Cir.), 137 Fed. Rep. 1020, 14 Am. B. R. 129; Shute v. Patterson, 147 Fed. Rep. 509.

[3] Scheuer v. Smith and Montgomery Book Co (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 7 Am. B. R. 384.

[4] B. A. 1898, Sec. 46.

CHAPTER XXI.

OFFENSES.

§ 228. Generally.

The bankrupt statute prescribes that certain acts shall constitute offenses, and provides penalties therefor.[1] The crimes or offenses defined in the act are misdemeanors[2] as distinguished from felonies.

A person may be liable to prosecution under a state or federal law, if the offense has been committed in bankruptcy proceedings, as perjury. Where a person makes himself liable to such punishment or penalty, it is probable that he may be proceeded against under such state or federal statute or under the bankrupt act.[3] But he can not be punished twice for the same offense.

It will be observed that the present act does not make it an offense to obtain goods by false pretenses prior to being adjudged a bankrupt. It seems that congress has left such offenses to be dealt with under the state law. The rule was otherwise under the act of 1867.[4]

§ 229. Misappropriation of property by the trustee.

It is made an offense under the bankrupt statute for any person to knowingly and fraudulently appropriate to his own use, embezzle, spend or unlawfully transfer any property, or

[1] B. A. 1898, Sec. 29. Compare R. S. Sec. 5132.

[2] U. S. v. Block, No. 14609 Fed. Kimball, No. 7768 Fed. Cas., 2 Ben. Cas., 4 Saw. 211; U. S. v. Prescott, No. 16084 Fed. Cas., 2 Biss. 325; U. S. v. Latorre, No. 15567 Fed. Cas., 8 Blatch. 134.

[3] Commonwealth v. Walker, 108 Mass. 309. But see State v. Pike, 15 N. H. 83.

[4] R. S. Sec. 5132, clauses 9 and 10.

secrete or destroy any document belonging to a bankrupt estate which came into his charge as trustee.[1]

The object of this provision is to protect the bankrupt and the creditors in case of a dishonest trustee. But it should be observed that the perversion of the assets must be tainted with fraud or done unlawfully or with evil intent to be an offense. An honest mistake is not sufficient to warrant an infliction of the penalty, although the results to the assets are equally disastrous.

The penalty for this offense is imprisonment for a period not exceeding five years.[2]

A trustee can not be compelled to give testimony which may tend to show that he has misappropriated the funds of the bankrupt's estate.[3]

§ 230. Concealment of property by a bankrupt.

Another offense is to knowingly and fraudulently conceal while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy.[1] To conceal is defined by the act to "include secrete, falsify and mutilate." [2]

No one can be punished for this offense unless he is or has been a bankrupt. The officers of a bankrupt corporation are not liable to punishment for this offense.[3]

The act of concealment must be done knowingly and fraudulently.[4] Thus, where property is, in fact, concealed *in specie,*

[1] B. A. 1898, Sec. 29*a*.

[2] B. A. 1898, Sec. 29*a*.

[3] *In re* Smith, 112 Fed. Rep. 509, 7 Am. B. R. 213.

[1] B. A. 1898, Sec. 29*b*, clause 1.

See charge to jury by Judge Brawley under this section in U. S. v. Levinson, 13 Am. B. R. 29.

[2] B. A. 1898, Sec. 1, clause 22.

[3] Field v. U. S. (C. C. A. 8th Cir.), 137 Fed. Rep. 6, 14 Am. B. R. 507; U. S. v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

[4] U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755; U. S. v. Lowenstein, 126 Fed. Rep. 884, 11 Am. B. R. 134; *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597.

or where the title is concealed by a colorable conveyance to prevent it passing into the possession of the trustee, it clearly comes within this provision, and is an offense under the act. If, however, the bankrupt actually transfers his property, although it is done fraudulently to keep it from his creditors, still, if he does not reserve any right to a reconveyance or any beneficial interest, that is, unless a secret trust in favor of himself is established, there is no concealment if the property is omitted from his schedules,[5] but if the facts show that the bankrupt reserved any beneficial interest for himself, there is a concealment.[6] Where a preference has been given or a transfer made within four months prior to the filing of the petition, it is not in itself *mala fides,* and under the present act, the bankrupt is not guilty of the offense of concealment in not setting forth such property in his schedule.[7]

It is not an offense punishable under the act to omit to name property in the schedule by accident or mistake,[8] or property which the debtor did not know that he owned,[9] or a mass of obsolete and worthless claims and demands on which no action

For charge to jury on indictment for concealing property from trustee, see U. S. v. Levinson, 13 Am. B. R. 29.

[5] *In re* Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527, affirmed (C. C. A. 2d Cir.), 130 Fed. Rep. 532, 11 Am. B. R. 511; *In re* Jacobs, 144 Fed. Rep. 868, 16 Am. B. R. 482; *In re* McGurn, 102 Fed. Rep. 743, 4 Am. B. R. 459; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; *In re* Cornell, 97 Fed. Rep. 29, 3 Am. B. R. 172; *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; *In re* Howell, 105 Fed. Rep. 594, 5 Am. B. R. 414*a*. But see *In re* Skinner, 97 Fed. Rep. 190, 3 Am. B. R. 163.

[6] *In re* Welch, 100 Fed. Rep. 65, 3 Am. B. R. 93; *In re* Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; *In re* Becker, 106 Fed. Rep. 54, 5 Am. B. R. 438; Bragasa v. St. Louis Cycle, 107 Fed. Rep. 77, 5 Am. B. R. 700; *In re* Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Gammon, 109 Fed. Rep. 312, 6 Am. B. R. 482; *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; U. S. v. Levinson, 13 Am. B. R. 29, 32.

[7] *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554.

[8] *In re* Wetmore, 90 Fed. Rep. 703, 3 Am. B. R. 700; *In re* Morrow, 97 Fed. Rep. 574, 3 Am. B. R. 263.

[9] *In re* Parker, No. 10720 Fed. Cas., 4 Biss. 501.

could be maintained,[10] or property which the bankrupt, in good faith, thought did not pass to the trustee,[11] or where the evidence does not show a legally consummated gift or transfer.[12] The fact that a bankrupt's interest in land is doubtful and if it exists may be exempt, does not prevent its omission from the schedule being a concealment, but is evidence to be considered in determining whether or not there was fraudulent intent.[13]

A claim for alimony which has not gone to judgment is not property which passes to the trustee and its omission from the schedule is therefore not an offense,[14] nor is the concealment of property acquired after adjudication.[15] It has also been said that there can be no concealment under the act when the title to all the bankrupt's property passed to a receiver before bankruptcy proceedings.[16] The offense of concealment can not be imputed, so where the husband of an innocent bankrupt conceals property the bankrupt is not guilty of an offense.[17] It is not a concealment of property for a husband who has failed in business to transact business in the name of his wife as her agent.[18]

The failure to include in the schedule money in bank, after the bankrupt's attention has been called to it, amounts to a concealment although if it had been included the assets would not amount to the exemptions,[19] or be sufficient to pay the expenses of the proceedings.[20] In the absence of any explanation

[10] *In re* Pearce, 21 Vt. 611.

[11] Rugely v. Robinson, 19 Ala. 404; *In re* Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696.

[12] *In re* Leeuw, 3 Am. B. R. 418.

[13] *In re* Todd, 112 Fed. Rep. 315, 7 Am. B. R. 770.

[14] *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. 733.

[15] *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548.

[16] *In re* Lesser (C. C. A. 2d Cir.), 114 Fed. Rep. 83, 8 Am. B. R. 15.

[17] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4; *In re* Hyman, 97 Fed. Rep. 195, 3 Am. B. R. 169.

[18] *In re* Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; *In re* Locks, 104 Fed. Rep. 783, 5 Am. B. R. 136.

[19] *In re* Royal, 112 Fed. Rep. 135, 7 Am. B. R. 106.

[20] *In re* Lowenstein, 106 Fed. Rep. 51, 2 Am. B. R. 193. See also *In re* Roy, 96 Fed. Rep. 400, 3 Am. B. R. 37.

the omission of property of value from the schedule after being advised that it should include all property, is sufficient to show a fraudulent concealment.[21] So also is the failure to schedule an interest in remainder under a will and the knowingly sending to a false address the notice to a creditor,[22] and the selling of goods at wholesale as soon as purchased and paying the proceeds to a friend,[23] and the payment of debts due to relatives when such debts were not kept in books of account.[24] An unexplained shrinkage of assets is evidence of concealment [25] and is held to raise a presumption and to throw the burden strongly on the bankrupt.[26] If accompanied by a failure to keep account books, there is sufficient proof of a concealment,[27] but a decision based merely on the fact that there was an unexplained shrinkage is incorrect, when the only evidence to show that there ever were such assets is a statement to a mercantile agency.[28]

Circumstances to establish concealment depend more or less upon the circumstances of each particular case.[29] Speaking of

[21] Osborn v. Perkins (C. C. A. 1st Cir.), 112 Fed. Rep. 127, 7 Am. B. R. 250; *In re* Breitling, 133 Fed. Rep. 146, 13 Am. B. R. 126.

[22] *In re* Roosa, 119 Fed. Rep. 542, 9 Am. B. R. 531; *In re* Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 11 Am. B. R. 539; *In re* Breiner, 129 Fed. Rep. 155, 11 Am. B. R. 684.

See also Woods v. Little (C. C. A. 3d Cir.), 134 Fed. Rep. 229, 13 Am. B. R. 742.

[23] *In re* Holstein, 114 Fed. Rep. 794, 8 Am. B. R. 147.

[24] *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94.

[25] *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; *In re* Breitling, 133 Fed. Rep. 146, 13 Am. B. R. 126.

[26] *In re* Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; *In re* Finkelstein, 101 Fed. Rep. 418, 3 Am. B. R. 800; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402.

[27] *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; *In re* Ablowich, 99 Fed. Rep. 81, 3 Am. B. R. 586; *In re* O'Gara, 97 Fed. Rep. 932, 3 Am. B. R. 349.

[28] *In re* Lesser (C. C. A. 2d Cir.), 114 Fed. Rep. 83, 8 Am. B. R. 15.

[29] In the following cases the bankrupt was held to have concealed property. *In re* Otto, 115 Fed. Rep. 860, 8 Am. B. R. 305, 753; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; *In re* Bullwinkle, 111 Fed. Rep. 364, 6 Am. B. R. 756; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re* Hoffman, 102 Fed. Rep. 979, 4 Am. B. R. 331; *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; *In re* Bragasa, 103 Fed. Rep. 936, 4

a charge of concealing property to defeat a discharge, Judge Blatchford said:[30]

"A fraud of the kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. The determination of the question of fraud or no fraud must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, and there was no fraud, there will not be found in their testimony and badges and indicia of fraud sufficient to overbear such positive testimony." The charge of concealment ought to be substantiated either by direct testimony or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken to be true upon any slight or

Am. B. R. 519; *In re* Heyman, 104 Fed. Rep. 677, 4 Am. B. R. 735; *In re* Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572; *In re* Semmel, 118 Fed. Rep. 487, 9 Am. B. R. 351.

In the following cases the bankrupt was held not to have concealed his property: Fields v. Karter (C. C. A. 5th Cir.), 115 Fed. Rep. 950, 8 Am. B. R. 351; *In re* Miner, 114 Fed. Rep. 998, 8 Am. B. R. 248; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Bryant, 104 Fed. Rep. 789, 5 Am. B. R. 114; *In re* Conn, 108 Fed. Rep. 525, 6 Am. B. R. 217; *In re* Hansen, 107 Fed. Rep. 252, 5 Am. B. R. 747; *In re* Slingluff, 105 Fed. Rep. 502, 5 Am. B. R. 76; *In re* Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696; *In re* Locks, 104 Fed. Rep. 783, 5 Am. B. R. 136; Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; *In re* Le Claire, 124 Fed. Rep. 654, 10 Am. B. R. 733.

[30] *In re* Goodridge, No. 5547 Fed. Cas., 2 N. B. R. 324.

ambiguous presumptions, nor upon any state of facts which do not clearly, and, indeed, almost necessarily, call for such an inference.[31] It should be borne in mind that the degree of proof here spoken of is not that necessary to convict the bankrupt, but that necessary to sustain specifications in opposition to discharge. To convict, the proof must be beyond a reasonable doubt.

The penalty for this offense is imprisonment for a period not to exceed two years.[32]

§ 231. False oath or account.

It is an offense to knowingly and fraudulently make a false oath or account in, or in relation to, any proceeding in bankruptcy.[1] An oath includes an affirmation.[2]

An offense under this provision may arise in connection with any oath or affirmation made in any part of the proceedings, as an oath to a schedule filed by a bankrupt, an oath to prove the debt of a creditor, an oath made to an account by a trustee, or a deposition or testimony given by any person in the course of the proceedings.[3] The essential elements are that it be made knowingly and fraudulently,[4] that it be false, and

[31] *In re* Lafleche, 109 Fed. Rep. 307, 6 Am. B. R. 483; *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Ferris, 105 Fed. Rep. 356, 5 Am. B. R. 246; *In re* Gaylord, 106 Fed. Rep. 833, 5 Am. B. R. 410; *In re* Corn, 106 Fed. Rep. 143, 5 Am. B. R. 478; *In re* Fitchard, 103 Fed. Rep. 742, 4 Am. B. R. 609; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266.

[32] B. A. 1898, Sec. 29*b*.

[1] B. A. 1898, 29*b*, clause 2.

[2] B. A. 1898, Sec. 1, clause 17.

[3] *In re* Conroy, 134 Fed. Rep. 764, 14 Am. B. R. 249; U. S. v. Wechsler, 16 Am. B. R. 1.

[4] Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 127 Fed. Rep. 686, 12 Am. B. R. 119; U. S. v. Simon, 146 Fed. Rep. 89; *In re* Freund, 98 Fed. Rep. 81, 3 Am. B. R. 418; Smith v. Keegan, 111 Fed. Rep. 157, 7 Am. B. R. 4; *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Beebe, 116 Fed. Rep. 48, 8 Am. B. R. 597.

that it be in, or in relation to, a proceeding in bankruptcy.[5] It is not an offense punishable under the act to unintentionally make a false statement under oath, and it would seem that Sec. 7, sub. 9, protects the bankrupt if he intentionally makes a false oath on his examination.[6] The mere understatement or overstatement in schedule, of the amount of debts, does not warrant the conclusion that the bankrupt was misrepresenting the condition of his estate;[7] nor is proof that the bankrupt made statements contrary to his oath, proof that the oath was false.[8] The fact that the bankrupt files amended schedules including property left out of the first schedules is evidence that the false oath to the first was not knowingly made, but is not conclusive, and if the first was knowingly made, the amended schedule would not work a cure.[9] Where the offense of concealment is committed by omitting assets from the schedule there must necessarily be a false oath, as the schedule must be verified by the bankrupt.[10] An indictment charging perjury for omitting assets from schedules is defective unless it charges directly that there was other property.[11] An indictment charging perjury under R. S. Sec. 5292 is bad on demurrer unless it charges that the defendant took the oath alleged to be false "willfully." [12]

So also a person who is required to make an account is guilty of an offense punishable under the act who knowingly

[5] *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

[6] U. S. v. Simon, 146 Fed. Rep. 89, 17 Am. B. R. 41; *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 400; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521. See also Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

[7] *In re* Miner, 114 Fed. Rep. 988, 8 Am. B. R. 248.

[8] Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

[9] *In re* Eaton, 110 Fed. Rep. 731, 6 Am. B. R. 531.

[10] *In re* Stoddart, 114 Fed. Rep. 486, 7 Am. B. R. 762; *In re* Boyden, 132 Fed. Rep. 991, 13 Am. B. R. 269.

[11] Bartlett v. United States (C. C. A. 9th Cir.), 106 Fed. Rep. 884, 5 Am. B. R. 678.

[12] U. S. v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

and fraudulently makes a false one, not necessarily under oath. This includes the schedule of a bankrupt, the reports of the trustee, receiver and other officers of the court, and any person or persons required by the court to furnish an account of property or funds. An honest mistake or an omission is not sufficient evidence of guilt. It must have been intentional, and for the purpose of deceiving, to render the person making it guilty of an offense.

A charge of perjury may be predicated upon false testimony given by the bankrupt upon the examination under Section 21*a* before a special commissioner.[13] It is necessary to show that the oath was administered to the defendant by a person properly appointed and authorized to do so, but it is sufficient to support the charge of perjury if the defendant take the oath either before he began to testify or when he got through and signed his name to the testimony.[14]

The penalty for this offense is imprisonment for a period not exceeding two years.[15]

§ 232. Presenting false claims.

It is an offense punishable under the bankrupt statute to knowingly and fraudulently present under oath any false claim for proof against the estate of a bankrupt, or use any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney.[1]

The essential elements of this offense are: *First*, the presenting of a false claim under oath for proof against the estate of the bankrupt or to use any such claim in composition; and, *secondly*, to do so knowingly and fraudulently. If either of these elements is wanting, it is not a punishable offense. The offense may be committed not only by the person who owns the claims, or who is to be benefited by proving it, but may

[13] U. S. v. Wechsler, 16 Am. B. R. 1; U. S. v. Simon, 146 Fed. Rep. 89, 17 Am. B. R. 41.

[14] U. S. v. Wechsler, 16 Am. B. R. 1.

[15] B. A. 1898, Sec. 29*b*.

[1] B. A. 1898, Sec. 29*b*, clause 3.

be committed by any agent, proxy or attorney who actually presents the false claim, knowing it to be false and with intent to practice a fraud upon the real creditors.

The penalty for this offense is imprisonment for a period not to exceed two years.[2]

§ 233. Receiving property from a bankrupt.

It is a punishable offense to knowingly and fraudulently receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act.[1]

The gist of the offense created by this clause is to receive property from a bankrupt after bankruptcy proceedings have been commenced, with intent to keep property from the trustee. The bankrupt who so transfers property is guilty of the offense of concealing property under the first clause of Section 29. This clause makes the person receiving such property also guilty of an offense punishable under the act. The offense can not be committed unless a petition has been filed in a court of competent jurisdiction in which a trustee can be appointed.[2] It is also essential that the person receiving the property does so knowingly and fraudulently with intent to defeat the act.[3]

The penalty for this offense is imprisonment for a period not to exceed two years.[4]

§ 234. Extorting money for forbearing to act.

It is a punishable offense under the bankrupt act to knowingly and fraudulently extort or attempt to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[1]

Under the former act it was held that acting or forbearing to act in bankruptcy proceedings was not such a consideration as would support a note.[2] But the present statute goes

[2] B. A. 1898, Sec. 29*b*.
[1] B. A. 1898, Sec. 29*b*, clause 4.
[2] See U. S. v. Latoore, No. 15567 Fed. Cas., 8 Blatch. 134.
[3] *In re* Luftig, 15 Am. B. R. 773.
[4] B. A. 1898, Sec. 29*b*.
[1] B. A. 1898, Sec. 29*b*, clause 5.
[2] Rice v. Maxwell, 13 Smeads & M. (21 Miss.) 289; Bell v. Leggett, 3 Selden (7 N. Y.) 178.

further; it makes it an offense punishable by imprisonment for a period not to exceed two years.[3]

§ 235. Offenses by referees.

The bankrupt statute specifies three offenses which may be committed by a referee. They are, if he knowingly, *first*, acts as a referee in a case in which he is directly or indirectly interested; or, *second*, purchases, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or, *third*, refuses, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.[1]

It is not an offense to refuse to permit an inspection of books, etc., unless such an inspection has been ordered by the court. If an inspection is denied by the referee or trustee, it is assumed that the refusal is based upon some good ground. If it is not, upon application to the court, an inspection will be allowed. A refusal by the referee or trustee after the order of court is an offense.

The penalty in case of any of the offenses mentioned in this section is a fine not to exceed five hundred dollars and a forfeiture of the office of referee.[1] The office becomes vacant immediately upon conviction.

§ 236. What court has jurisdiction of criminal proceedings.

Proceedings to punish for offenses under the bankrupt act may be instituted by a court of bankruptcy or in a circuit court of the United States. In the general grant of powers conferred by Section 2 of the act, upon the courts of bankruptcy, it is provided that they "are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and

[3] B. A. 1898, Sec. 29*b*. [1] B. A. 1898, Sec. 29*c*.

during their respective terms, as they are now or may be hereafter held, to . . . . *fourth*, arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States," and Section *23c* provides that "the United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

The court for the district within which the offense is committed has jurisdiction to punish for the offense.

§ 237. Practice and procedure.

Proceedings to punish a person for an offense under the bankrupt act are criminal in their nature. In such trials and proceedings the bankrupt act expressly adopts "the laws of procedure of the United States now in force, or such as may be hereafter enacted regulating trials for the alleged violation of laws of the United States." [1] So also the right to submit an alleged offense under the act to a jury is determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted, in relation to trials by jury.[2]

Criminal proceedings in bankruptcy are regularly instituted by an indictment found by a grand jury. But it has been held that where the crime is not infamous, within the meaning of that term as used in the fifth amendment to the constitution, the person committing it may be prosecuted by information.[3] It would seem that all offenses under the present bankrupt act, except those punishable by fine only, are infamous within the meaning of that term given by the

[1] B. A. 1898, Sec. *29c*.
[2] B. A. 1888, Sec. *19c*.
[3] U. S. v. Block, No. 14609 Fed. Cas., 4 Saw. 211.

supreme court.[4] It has been said that "the question is whether the crime is one for which the statutes authorize the courts to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury." [5]

It has been held that the schedules in bankruptcy can not be used before the grand jury in obtaining an indictment of the bankrupt for fraudulent concealment of property under Section 29*b*.[6] It has also been held that books and papers taken possession of by a trustee or receiver appointed by a court of bankruptcy, can not be used in a criminal prosecution against persons from whose possession, custody or control the books were taken.[7]

General averments in an indictment are not sufficient. It must show an offense, and must convey to the accused the information necessary to enable him to make his defense.[8] It is not sufficient in an indictment to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven, in order to convict, that a petition in bankruptcy was presented to the bankruptcy court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.[8] The word "feloniously"

[4] See the discussion of this subject by Mr. Justice Gray, in *Ex parte* Wilson, 114 U. S. 424, 29 L. Ed. 89, *et seq.* See also Medley, Petitioner, 134 U. S. 160, 33 L. Ed. 835; Mackin v. U. S., 117 U. S. 348, 29 L. Ed. 909; Parkinson v. U. S., 121 U. S. 281, 30 L. Ed. 959; U. S. v. De Walt, 128 U. S. 393, 32 L. Ed. 485.

[5] In *Ex parte* Wilson, 114 U. S. 426, 29 L. Ed. 89.

[6] U. S. v. Chambers, 135 Fed. Rep. 1023, 13 Am. B. R. 708.

[7] People v. Swarts (Crim. Ct. Cook Co., Ill.), 24 Nat. Corp Rep. 266, 8 Am. B. R. 487.

But see State v. Strait, 94 Minn. 384; Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746; Blum v. State, 94 Md. 375.

[8] Bartlett v. U. S. 106 Fed. Rep. 884, 5 Am. B. R. 678; U. S. v. Latorre, No. 15567 Fed. Cas., 8 Blatch

should not be used, as the offense is only a misdemeanor. An indictment charging perjury is bad on demurrer unless it charges that the defendant took the oath alleged to be false "willfully."[9] Under an indictment for perjury for false testimony given by a bankrupt upon an examination under Section 21*a* before a special commissioner, it is necessary to show that the oath was administered to the defendant by a person properly appointed and authorized to do so, but it is sufficient to show that the defendant took the oath either before he began to testify or when he got through and signed his name to the testimony.[10] It has been held that a failure to allege specifically that the property concealed was the property of the bankrupt at the time of the adjudication, was a formal defect and not fatal.[11]

The proceedings subsequent to the indictment are such as are regularly had in criminal cases in federal courts, a general consideration of which is not within the scope of this work.

The language with reference to who may be punished by a court of bankruptcy includes bankrupts, officers and other persons, and the agents, officers, members of the boards of directors, trustees and other similar controlling bodies, of corporations.[12] This language is undoubtedly broad enough to include all persons who conspire with the bankrupt to commit the offenses mentioned in the act.[13] It has been held that a person can not be punished under Section 29 who is not or has not been a bankrupt. The officers of a bankrupt corpo-

134; U. S. v. Prescott, No. 16084 Fed. Cas., 2 Biss. 325; U. S. v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

Consult also Reg. v. Lands, 33 Eng. Law and Eq. 536; Rex v. Jones, 24 E. C. L. 156; Reg. v. Ewington, 41 E. C. L. 178; Reg. v. Boyd, 5 Cox Cr. Cas. 502.

[9] U. S. v. Lake, 129 Fed. Rep. 499, 12 Am. B. R. 270.

[10] U. S. v. Wechsler, 16 Am. B. R. 1.

[11] U. S. v. Jackson, 2 Fed. Rep. 502.

[12] B. A. 1898, Sec. 2, clause 4.

[13] See U. S. v. Bayer, No. 14547 Fed. Cas., 4 Dill. 407.

Consult U. S. v Stevens, 44 Fed. Rep. 132; U. S. v. Snyder, 8 Fed. Rep. 805, 14 Fed. Rep. 554; U. S. v. Houghton, 14 Fed. Rep. 544.

ration are not liable to punishment for this reason.[14] The indictment must be found or information filed within one year from the commission of the offense.[15]

[14] Field v. U. S. (C. C. A. 8th Cir.), 137 Fed. Rep. 6, 14 Am. B. R. 507; U. S. v. Lake, 129 Fed Rep. 499, 12 Am. B. R. 270.

[15] B. A. 1898, Sec. 29*d*.

CHAPTER XXII.

PROCEEDINGS TO PUNISH FOR CONTEMPT.

§ 238. The power to commit.

The power to punish for contempt is inherent in all courts of the United States.[1] But the power is expressly conferred upon courts of bankruptcy to enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment, and to punish persons for contempts committed before referees.[2] A referee has no power to punish a contempt.[3]

A court of bankruptcy may undoubtedly punish a person who has misbehaved in the presence of the court;[4] or so near thereto as to obstruct the administration of justice, as on a piazza adjoining the court-room,[5] or in a jury-room or hall,[6]

[1] *Ex parte* Robinson, 19 Wall. 510, 22 L. Ed. 205; Besette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997.

[2] B. A. 1898, Sec. 2, clause 13 and 16, and Sec. 41.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court construing this section, said:

"By reference to section 41 it will be seen that 'the things forbidden in this section,' concerning which the referee is required to certify the facts to the judge, include only those things which would be punishable as contempts by all courts of record. They are the common and familiar heads for the exercise of this jurisdiction by all courts of record. No new or enlarged jurisdiction is conferred, and no power to impose a punishment which might not rightly and lawfully be imposed, on a similar state of facts, by any other United States court. Any act, matter, or thing which any United States court may punish as a contempt may be punished as such by a court of bankruptcy; and any act, matter, or thing which can not be punished as a contempt by other United States courts can not be punished as such by a court of bankruptcy."

[3] B. A. 1898, Sec. 41; Bank of Ravenswood v. Johnson (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 16 Am B. R. 206; Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291; Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[4] U. S. v. Patterson, 26 Fed. Rep. 509; Blight v. Fisher, No. 1542 Fed. Cas., Pet. C. C. 41.

[5] United States v. Carter, No. 14740, 3 Cranch, C. C. 423; *Ex parte* Salkey, No. 12253 Fed. Cas., 6 Biss. 269, affirmed on petition for *habeas corpus*, No. 12254 Fed. Cas., 6 Biss. 280.

[6] See *In re* Savin, 131 U. S. 267, 33 L. Ed. 150.

or before a referee,[7] or where there has been misbehavior of any officer of the court in his official transactions, as where one of its officers refuses to pay over money due from him in his official capacity,[8] or where a witness refuses to be sworn according to law,[9] or where a witness refuses to answer questions in court or before a referee,[10] or where there has been disobedience or resistance by a bankrupt, officer or other person to any lawful writ, process, order, rule or decree, or command of the court,[11] or where the bankrupt after filing petition surrendered mortgaged property to the mortgagee,[12] or where the bankrupt withdraws from the office of the referee before the completion of his examination,[13] or where there has been an assault on an officer of the court, as upon a trustee in the performance of the duties of his office.[14]

It is a contempt to disobey or resist any lawful process of the court duly served, as a subpœna to a witness to testify in court,[15] or before a referee,[16] or to produce written documents,[17] or a final decree or interlocutory order of the court.

[7] B. A. 1898, Sec. 2, clause 16; Sharon v. Hill, 24 Fed. Rep. 726; United States v. Anonymous, 21 Fed. Rep. 761.

[8] *In re* Pittman, No. 11184 Fed. Cas., 1 Curtis 186; Jeffries v. Laurie, 27 Fed. Rep. 198; *In re* Paschal, 10 Wall. 491, 19 L. Ed. 992; Bogart v. Supply Co., 27 Fed. Rep. 722.

[9] B. A. 1898, Sec. 21*a*; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

[10] B. A. 1898, Sec. 21*a*. U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755.

[11] B. A. 1898, Sec. 2, clause 13; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

[12] *In re* Arnett, 112 Fed. Rep. 770, 7 Am. B. R. 522.

[13] *In re* Vogel, No. 16984 Fed. Cas., 5 N. B. R. 393.

[14] *Ex parte* O'Neal, 125 Fed. Rep. 967, 11 Am. B. R. 196.

[15] B. A. 1898, Sec. 21*a*; Carman v. Emerson, 71 Fed. Rep. 264, 18 C. C. A. 38; United States v. Caldwell, 2 Dall. 333; Norris v. Hassler, 23 Fed. Rep. 581; *In re* Ellerbe, 13 Fed. Rep. 530.

[16] B. A. 1898, Sec. 21*a* and Sec. 41; *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582; *In re* Spofford, 62 Fed. Rep. 443; Johnson Steel Co. v. N. B. Steel Co., 48 Fed. Rep. 191; *In re* Allen, No. 208 Fed. Cas., 13 Blatch. 271.

In re Kerber, 125 Fed. Rep. 653, 10 Am. B. R. 747, it was held that mileage and fee for one day's attendance must be paid or tendered witness before he could be attached for contempt.

[17] B. A. 1898, Sec. 41.

Where a person has used due diligence to comply with the orders of the court, he is not guilty of contempt.[18] It has been said that an order of court "does not mean a written order always, but only an exercise of authority constituting a requirement.[19] The question as to whether the act constitutes a contempt of an order of court usually arises, however, upon a writing, as upon an order to deliver property by the bankrupt,[20] or an order of injunction. It should be observed that it is only lawful orders the disobedience of which may be punished for contempt. The court has power to order a bankrupt to pay over to his trustee money found to be in his possession or control and properly belonging to his estate, and if the bankrupt fails to obey such order the court may commit him for contempt until he complies.[21] The same rule has been applied in cases of an agent or bailee of property of the bankrupt,[22] or in case of failure to produce books of account when ordered.[23] The court may require petitioning creditors to pay the expenses of a receivership upon dismissing the petition.[24] If, however, the court is without power to make the order, it is without power to punish for a diso-

[18] *In re* Carpenter, No. 2427 Fed. Cas., 1 N. B. R. 299.

[19] Bridges v. Sheldon, 7 Fed. Rep. 45.

[20] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Leinweber, 128 Fed. Rep. 641, 12 Am. B. R. 175; *In re* Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153

[21] *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299; *In re* Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am B. R. 361; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411.

[22] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Feldser, 134 Fed Rep. 307, 14 Am. B. R. 216.

[23] *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

[24] *In re* Lacov (C. C. A. 2d Cir.), 142 Fed. Rep. 960, 15 Am. B. R. 290.

bedience of it.[25] Where the person having possession of property claimed by the bankrupt sets up an adverse claim in himself to the property, he is entitled to a plenary suit.[25] In such cases he can not be required to answer a rule to show cause in a summary proceeding for disobedience of an order to turn over to the trustee such property.[25]

The courts have frequently been called upon in the exercise of general jurisdiction to determine what constitutes contempt of court in the disobedience or resistance of an injunction order. Generally, to do the thing enjoined is contempt, and it has been held to be a violation of an injunction for the person enjoined to be present at the commission of the act, aiding and abetting, although not actually taking part in it,[26] or to do the act enjoined as agent or servant of another person.[27] The mere fact that a person did not think that his act amounted to a violation of the injunction, is no defense,[28] nor the fact that he acted under advice of counsel.[29] But where the violation of an injunction order is not willful this fact may be considered in mitigation of the punishment to be imposed.[30]

[25] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[26] Dunks v. Gray, 3 Fed. Rep. 868; St. John's College v. Carter, 8 Law Jour. Eq. N. S. 218; Societe v. Western Distilling Co., 42 Fed. Rep. 96.

In *In re* Wall, 13 Fed. Rep. 818, the court said: "I am too well aware of his influence in this community not to know that his presence would be ample encouragement to others on such an occasion. It is not alone by words that one advises and encourages, and the fact of his presence and action is sufficient not only to find an encouraging thereby, but raise the presumption on his doing the same by words."

[27] Dunks v. Gray, 3 Fed. Rep. 868, 41 Vt. 246.

[28] Atlantic, etc., Co. v. Dittmar Co., 9 Fed. Rep. 316.

[29] U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755; *In re* Krinsky Bros., 112 Fed. Rep. 972, 7 Am. B. R. 535; Burr v. Kimbark, 29 Fed. Rep. 432; United States v. Memphis, etc., R. R. Co., 6 Fed. Rep. 238; Goodyear v. Mullee, No. 5577 Fed. Cas., 5 Blatch. 429; Ulman v. Ritter, 72 Fed. Rep. 1000; Societe v. Distilling Co., 42 Fed. Rep. 96.

[30] Morss v. Sewing Machine Co., 38 Fed. Rep. 482; Iowa Barb Wire Co. v. Southern Co., 30 Fed. Rep. 615.

It is well settled that a showing made by a respondent that he is unable to do an act required of him upon an order to show cause is a sufficient answer.[31] It matters not for the purpose of such a proceeding that the inability to do the thing required may be in consequence of his own fault arising from a mere misconception of his rights or committed before the court took jurisdiction of the matter. The court can not compel an impossibility. It is a sufficient answer to a rule to show cause why he should not be punished for contempt for refusing to obey an order to turn over property to the bankrupt's trustee, to show that the property is not in his possession or under his control.[32] The court must be satisfied beyond a reasonable doubt that the respondent can comply with its order to be justified in adjudging him guilty of contempt.[33] The uncorroborated evidence of a bankrupt of his inability to comply with the order is far from controlling.[34]

The power of the court of bankruptcy to punish for the disobedience of its orders extends only to such orders as actually

[31] Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393; *In re* Felson, 124 Fed. Rep. 288, 10 Am. B. R. 716; *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537; Hendryx v. Fitzpatrick,, 19 Fed. Rep. 810, 814, per Lowell and Nelson, Judges; *In re* Chiles, 22 Wall. 157, 168, 22 L. Ed. 819; Kane v. Haywood, 66 N. C. 1; *In re* Hausman (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 10 Am. B. R. 64.

[32] Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393; *Ex parte* Comingor (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re* Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302; *In re* Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; Samel v. Dodd (C. C. A. 5th Cir.), 142 Fed. Rep. 68, 16 Am. B. R. 163.

[33] American Trust Co. v. Wallis (C. C. A. 3d Cir.), 126 Fed. Rep. 464, 11 Am. B. R. 360; *In re* Goldfarb Bros., 131 Fed. Rep. 643, 12 Am. B. R. 386; *In re* Switzer, 140 Fed. Rep. 976, 15 Am. B. R. 468; *In re* Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; Samel v. Dodd (C. C. A. 5th Cir.), 142 Fed. Rep. 68, 16 Am. B. R. 163.

[34] *In re* Henderson, 130 Fed. Rep. 385, 12 Am. B. R. 351; Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178; *In re* Leinweber, 128 Fed. Rep. 641, 12 Am. B. R. 175; *In re* Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 499.

exist,[35] and after the person enjoined has had notice.[36] It is not necessary that the respondent be served with a copy of the order of the court, if knowledge of its contents came to him otherwise.[37] This has been held true even when he was beyond the territorial jurisdiction of the court of bankruptcy at that time.[38] An order actually made by the court is binding until reversed or set aside, even though the court making it is without jurisdiction.[39]

In the ordinary case of advising clients if an attorney gives it in good faith and in the honest belief that his advice is well founded and in the just interest of his client, he can not be held for contempt for error in judgment.[40] Where judicial action is alleged to have been induced by the advice of counsel complained of, on the ground that there is conspiracy between the state court and the attorneys to obstruct the administration of justice, the attorneys can not be punished for contempt.[40]

[35] *Ex parte* Buskirk, 72 Fed. Rep. 14, 18 C. C. A. 410.

[36] *In re* Cary, 10 Fed. Rep. 622. See notes to this case for discussion of contempt; *In re* Schwartz, 14 Fed. Rep. 787; Ulman v. Ritter, 72 Fed. Rep. 1000; Toledo, etc., R. R. Co. v. Penn. Co., 54 Fed. Rep. 746.

[37] *In re* Krinsky Bros., 112 Fed. Rep. 972, 7 Am. B. R. 535; Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269.

In re Lennon, 166 U. S. 548, 554, 41 L. Ed. 1110, the supreme court said:

"The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."

[38] Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R. 269.

[39] Worden v. Searls, 121 U. S. 14, 30 L. Ed. 853; *In re* Eaton, 51 Fed. Rep. 804; Wagner v. U. S. (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; Blake v. Nesbet, 144 Fed. Rep. 279, 16 Am. B. R 269.

[40] *In re* Watts and Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113.

§ 239. Nature of the proceedings.

Proceedings for contempt are of a twofold nature, criminal and civil. For the purpose of punishing the guilty party for his disrespect to the court or its order the proceeding is criminal.[1] As a means of compelling obedience to some lawful order requiring the party to perform some act or duty required of him, and which he refuses to perform, the proceedings may be civil or criminal.[2] Thus if the respondent had in his possession property, and is ordered to deliver it to the court, or some person named by the court, within a fixed time, and he willfully refuses to obey the order, it being within his power to do so, then a civil process of contempt may be resorted to as a means of compelling obedience to the order of the court, and the party refusing to obey may be confined and imprisoned until he performs the act required of him or shows that it is not in his power to do it.[3] He may also be proceeded against criminally, because the disrespect being willful, it is an offense against the government.

[1] Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997; *In re* Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; New Orleans v. Steamship Co., 20 Wall. 393, 22 L. Ed. 354; *Ex parte* Kearney, 7 Wheat. 38, 5 L. Ed. 391; *In re* Manning, 44 Fed. Rep. 275; United States v. Berry, 24 Fed. Rep. 780; *In re* Ellerbe, 13 Fed. Rep. 530.

[2] Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997; *In re* Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; Worden v. Searles, 121 U. S. 26, 30 L. Ed. 853; Hayes v. Fischer, 102 U. S. 122, 26 L. Ed. 95; *In re* Graves, 29 Fed. Rep. 60, 4 Blackstone's Com. 285; Wells, Fargo & Co. v. Oregon Co., 19 Fed. Rep. 20.

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, on page 813, Judge Lowell observed: "If the proceeding should be criminal in form it would make no difference. A criminal sentence for the benefit of a private person is to be treated as civil to all intents and purposes." See also observation of Mr. Justice Miller in *In re* Chiles, 22 Wall. 168, 22 L. Ed. 819.

[3] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Levy & Co. (C. C. A. 2d Cir.), 142 Fed. Rep. 442, 15 Am. B. R. 166, and cases cited in the opinion; *In re* Salkey, No. 12254 Fed. Cas., 6 Biss. 280.

§ 240. Practice, pleadings and procedure.

Proceedings in contempt should not be instituted before the contempt has been committed. A proceeding for contempt is of a different character from one resulting in a mere order, as for the payment of money to the trustee or granting an injunction. An order should not direct a commitment in case of failure to comply with it, without giving the defendant a day in court with reference to that part of the order.[1]

The mode of proceeding in a court of bankruptcy to determine whether a constructive contempt has been committed should conform to the established practice in like cases in all other United States courts as near as may be, and what is legally sufficient to purge a contempt in the other courts of the United States is sufficient to purge the like contempt in a court of bankruptcy.[2]

It is proper and probably better practice to bring the question of contempt to the attention of the court by a petition or motion for rule to show cause. The practice in the federal courts in contempt proceedings has been far from uniform in this respect.

In case the proceedings are instituted to punish a contempt committed before a referee, they are commenced by a certificate of the referee.[3] The judge thereupon, in a summary manner, hears the evidence as to the acts complained of, and if it is such as to warrant him in so doing, punishes such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commits such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.[3]

[1] *In re* Cole (C. C. A. 1st Cir.), 144 Fed. Rep. 392, 16 Am. B. R. 302; *In re* Davison, 143 Fed. Rep. 673, 16 Am. B. R. 337; *In re* Hershkowitz, 136 Fed. Rep. 950, 14 Am. B. R. 86.

[2] Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[3] B. A. 1898, Sec. 41*b*; U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755. See U. S. v. Anonymous, 21 Fed. Rep. 761.

The petition or motion may be entitled and filed in the original action.[4] Where the proceeding is criminal, and punishment is asked for, it may be instituted in the name of the United States.[5] The petition should state the names of the persons to be attached;[6] the specific acts of commission or omission which constitute the contempt;[7] when and where committed;[8] that the order, if any, was lawful, and the date made and by whom; the allowance or grant of an injunction, if any, when and by whom, and that it had been issued on the terms specified and within the limits imposed, and had been duly served in the mode required by it, and by the proper officer. In some cases it is necessary to charge that the acts complained of were done "willfully and contemptuously," and "with full notice and knowledge."[9]

The prayer or request of the petition or motion should be for an order or rule requiring the contemnor to appear in court at a certain time and place, and show cause why he should not be attached and punished for contempt.

The facts stated in the petition should be verified by an affidavit, and a motion should be supported by affidavits setting forth the facts. A copy of the petition or motion and affidavits should generally be served upon the contemnor personally.[10]

[4] See Creditors v. Cozzens, No. 3378 Fed. Cas., 3 N. B. R. 281.

[5] As in United States v. Atcheson R. S. Co., 16 Fed. Rep. 853; United States v. Murphy, 44 Fed. Rep. 39.

[6] Creditors v. Cozzens, No. 3378 Fed. Cas., 3 N. B. R. 281; American Construction Co. v. Rail Road Co., 52 Fed. Rep. 937.

[7] Toledo C. C. R. Co. v. Penn. Co., 54 Fed. Rep. 747. See also *In re* Swan, 150 U. S. 637, 37 L. Ed. 1207; *In re* Sawyer, 124 U. S. 207, 31 L. Ed. 402.

In U. S. v. Goldstein, 132 Fed. Rep. 789, 12 Am. B. R. 755, for refusing to answer "sundry questions" put to him during his examination before the referee, was held sufficient, although it did not set out the questions.

[8] See United States v. Berry, 24 Fed. Rep. 780; *In re* Litchfield, 13 Fed. Rep. 868-9.

[9] See statement in affidavits charging *In re* Sawyer, 124 U. S. 207, 31 L. Ed. 402; Toledo, etc., Ry. Co. v. Penn. Co., 54 Fed. Rep. 751.

[10] American Construction Co. v. Rail Road Company, 52 Fed. Rep. 938; United States v. Murphy, 44 Fed. Rep. 40; Gray v. Chicago, etc., R. R Co., No. 5713 Fed Cas.,

The court will ordinarily order a rule to show cause to issue if a *prima facie* case is made. It is not necessary that the matter alleged as the foundation for the charge appear in the rule to show cause, because the rule is served merely as a basis for process. The rule to show cause should be personally served on the contemnor.[11] The attachment to take the body of the contemnor is rarely resorted to, for the reason that if he appear on the day specified it is not necessary, and if he does not appear the rule may be made absolute, and if convicted he may be arrested under a warrant or a mittimus. But when there is danger that the contemnor will flee from the district, the attachment has been issued immediately upon instituting the proceedings.[12] In one case, at least, a rule has been issued requiring him "to appear in court forthwith to show cause." [13]

To the rule to show cause, the contemnor may make return or answer under oath before the day set for hearing, in which he may deny the allegations of the petition or admit them, or admit them and justify his action.[14] The denials

Woolw. 63. But see Fanshawe v. Tracy, No. 4643 Fed. Cas., 4 Biss. 490.

In Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291, the want of notice was held error.

[11] *In re* Hooks Smelting Co., 146 Fed. Rep. 336, 15 Am. B. R. 834.

[12] This was done in Thomas v. C., N. O. & T. P. R. R. Co., *In re* Phelan, 62 Fed. Rep. 817, and the person was brought directly to court, and admitted to bail, although this does not appear in the report of the case.

But consult the observation of Judge Drummond, in Fanshawe v. Tracy, No. 4643 Fed. Cas., 4 Biss. 490.

[13] This was done in Toledo, etc., R. Co. v. Penn. Co., 54 Fed. Rep. 751. But see Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393.

[14] This was done *In re* Swan, 150 U. S. 639, 37 L. Ed. 1207; *In re* Sawyer, 124 U. S. 207, 31 L. Ed. 402; *In re* Ayers, 123 U. S. 456, 31 L. Ed. 216.

In Boyd v. Glucklich (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 8 Am. B. R. 393, the court said: "Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While pro-

in the return or answer are not conclusive.[15] At common law the sworn answer was not to be controverted as to matters of fact.[16] Mr. Justice Curtis, however, adds to this statement, "there were certain precedents for the introduction of other kinds of proof." [17] The court may pronounce judgment and make the rule absolute if no answer is filed, or if the answer admits facts which, in the opinion of the court, constitute contempt, or if a justification is deemed insufficient.

When a sufficient return or answer has been made, the parties appear before the court at the time specified for the hearing. Both parties may present testimony by witnesses

ceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt." See also *In re* Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 499; *In re* Hausman (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 10 Am. B. R. 64.

[15] 2 High on Injunctions, 1455; United States v. Anonymous, 21 Fed. Rep. 767; Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178; *In re* De Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723.

In Ripon Knitting Works, 101 Fed. Rep. 810, 4 Am. B. R. 299, Judge Hanford said: "One of the principal grounds of defense upon which the respondent relies is contained in his answer denying that he has any money. His answer is not conclusive, but the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it." See also U. S. v. Sweeney, 95 Fed. Rep. 434; *In re* Purvine, 2 Am. B. R. 787, 96 Fed. Rep. 192; *In re* Mayer, 3 Am. B. R. 533, 98 Fed. Rep. 839; *In re* Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411; *In re* Shachter, 119 Fed. Rep. 1010, 9 Am. B. R. 449.

[16] *In re* Pittman, No. 11184 Fed. Cas., 1 Curtis, 186, per Mr. Justice Curtis; United States v. Dodge, No. 14975 Fed. Cas., 2 Gall. 313; 4 Blackstone's Com. 286-7; *In re* May, 1 Fed. Rep. 743.

[17] *In re* Pittman, No. 11184 Fed. Cas., 1 Curtis, 186, and cases collated.

examined orally [18] or by affidavits.[19] The contemnor may appear in person or by counsel, and may file his own affidavit in his own behalf, or with his consent be examined upon written interrogatories.[20] But he can not be compelled to testify against himself. He is not entitled to demand a trial by jury.[21] After the evidence has been adduced, the court will hear arguments of counsel and determine the facts for itself, or it may refer them to a referee. The question of commitment can not be left to the discretion of the referee.[22]

If the court finds the proofs do not support the charge of contempt, the proper judgment is to dismiss the rule, and if the contemnor has been arrested and is in the custody of the marshal or admitted to bail, also to discharge the person. If no cause is shown why he should not be punished for contempt, the court should order the rule to be confirmed and made absolute, and adjudge the person guilty of contempt and fix his punishment. It is good practice for the judgment to recite the offense, but it is not necessary, if it describes the offense charged by reference to other proceedings.[23]

The power of the court to punish contempts of their authority is limited to fine or imprisonment or fine and imprisonment;[24] but there is no limit to the extent of either fine or imprisonment. But it has been held that a bankrupt can not be imprisoned indefinitely, when it is not certainly known that

[18] Savin, petitioner, 131 U. S. 267, 279, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 281, 33 L. Ed. 154; Randall v. Brigham, 7 Wall. 540, 19 L. Ed. 285.

[19] Mexican Ore Co. v. Mexican Co., 47 Fed. Rep. 353; United States v. Anonymous, 21 Fed. Rep. 767; United States v. Atcheson, etc., R. S. Co., 16 Fed. Rep. 855; United States v. Justices, 10 Fed. Rep. 461.

[20] See Savin, petitioner, 131 U. S. 279, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 281, 33 L. Ed. 154.

[21] Ripon Knitting Works v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299.

See also Tinsley v. Anderson, 171 U. S. 101, 43 L. Ed. 91; *Ex parte* Terry, 128 U. S. 289, 32 L. Ed. 405; Eilenbecker v. Plymouth County, 134 U. S. 31, 33 L. Ed. 801.

[22] Smith v. Belford (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 5 Am. B. R. 291.

[23] Fischer v. Hayes, 6 Fed. Rep. 70; Loveland's Forms Fed. Prac., Nos. 718-720.

[24] B. A. 1898, Sec. 2, clause 13.

he has property which he has been ordered to surrender.[25] A court can not disbar an attorney for contempt.[26] It can not punish contempt committed in any other court.[27]

When a fine is imposed as punishment, the contemnor may be ordered to stand committed until the fine and cost be paid,[28] and such an order is not in conflict with statutes prohibiting imprisonment for debt.[29]

When the judgment of the court be imprisonment or fine and commitment until paid, a warrant or mittimus is issued. It recites that the contemnor has been convicted of a contempt of court, and should specify particularly where and how long the contemnor is to be imprisoned, and what he is to do to entitle him to discharge. Thus it may command the marshal to take the body of the contemnor and keep him in custody until he shall have paid into court the amount of the fine, together with the fees of the marshal thereon,[30] or it may specify a particular place and term of imprisonment, and command the marshal to take the body of the person and commit the same to such place of confinement.[31]

The rule with reference to the power of the court committing a contemnor to release him by a subsequent order seems to be, that in case of a criminal contempt, being an offense against the United States, and the commitment but an execution of the judgment of conviction, the court has no power to discharge or remit the sentence.[32] But it falls within the pardoning power of the president by the consti-

[25] *In re* Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410.

[26] *Ex parte* Robinson, 19 Wall. 513, 22 L. Ed. 205.

[27] *Ex parte* Bradley, 7 Wall. 372, 19 L. Ed. 214.

[28] See *In re* Tyler, 149 U. S. 180, 37 L. Ed. 689.

[29] Bogart v. Supply Co., 27 Fed. Rep. 722; Jeffries v. Laurie, 27 Fed. Rep. 198; Fischer v. Hayes, 6 Fed. Rep. 63; Ripon Knitting Works v. Schreiber, 101 Fed. Rep. 810, 4 Am. B. R. 299.

[30] Fischer v. Hayes, 7 Fed. Rep. 98. For form of mittimus, see Loveland's Forms Fed. Prac., Nos. 730, 731.

[31] Loveland's Forms, Fed. Prac., No. 731.

[32] *In re* Mullee, No. 9911 Fed. Cas., 7 Blatch. 23.

tution.[33] Where the proceeding is of a civil nature, the court has power to release the person.[34]

Where a person has been imprisoned for contempt, relief is usually sought by *habeas corpus*.[35] The person may be discharged if the order of commitment was utterly void,[36] otherwise not.[37] The inquiry can not be extended under a writ of *habeas corpus* so as to review, as upon writ of error, any irregularity of the proceedings in the court of bankruptcy, or to determine, as upon appeal, the real merits of the case.[38]

An order to pay over to a trustee money or property of the estate of the bankrupt and adjudging the party disobeying such an order to be in contempt may be reviewed on a petition for revision as to matters of law by the circuit courts of appeals.[39] It has been held that contempt proceedings are not a part of the original case, but separate and distinct therefrom, and the order of the court, a judgment in a criminal case, and therefore reviewable upon a writ of error by the court of appeals.[40]

[33] Dixon's Case, 3 Atty. Gen. Opp. 622; Rowan's Case, 4 Atty. Gen. Opp. 458; Conger's Case, 4 Atty. Gen. Opp. 317.

[34] Hendryx v. Fitzpatrick, 19 Fed. Rep. 810; *In re* Henderson, 13 Am. B. R. 782.

In re Taylor, 114 Fed. Rep. 607, 7 Am. B. R. 410, the court discharged the prisoner on the ground that it was useless to keep him imprisoned in order to recover money claimed to be in his possession.

[35] *In re* Watts and Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Claiborne, 109 Fed. Rep. 74, 5 Am. B. R. 812.

[36] *Ex parte* Terry, 128 U. S. 289, 32 L. Ed. 405; *Ex parte* Fisk, 113 U. S. 713, 28 L. Ed. 1117.

[37] *In re* Tyler, 149 U. S. 180, 37 L. Ed. 689; Savin, petitioner, 131 U. S. 267, 33 L. Ed. 150; Cuddy, petitioner, 131 U. S. 280, 286, 33 L. Ed. 154; *Ex parte* Kearney, 7 Wheat. 38, 5 L. Ed. 391; *In re* Eaton, 51 Fed. Rep. 804.

[38] *Ex parte* O'Neal, 125 Fed. Rep. 967, 11 Am. B. R. 196.

[39] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Boyd v. Glucklich, 116 Fed. Rep. 131, 8 Am. B. R. 393.

[40] Bessette v. Conkey Co., 194 U. S. 324, 48 L. Ed. 997; Gould v. Sessions (C. C. A. 2d Cir.), 67 Fed. Rep. 163; Butler v. Fayerweather (C. C. A. 2d Cir.), 91 Fed. Rep. 458; Cary Mfg. Co. v. Acme Co. (C. C. A. 2d Cir.), 108 Fed. Rep. 873; Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C. A. 2d Cir.), 123 Fed. Rep. 632, s. c. 194 U. S. 458, 48 L. Ed. 1072; Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. (C. C. A. 6th Cir.), 120 Fed. Rep. 105, 63 C. C. A. 607.

CHAPTER XXIII.

COMPOSITIONS AND ARBITRATIONS.

§ 241. The general nature of a composition.

The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts.

The bankrupt presents a list of the names of his creditors and the amount due each of them, the amount of his assets and the rate *per centum* he is willing to pay on these debts as a compromise, in consideration of his discharge from the balance due each creditor. His creditors consider the subject, thus presented, after the debtor has been examined under oath.[1] The whole matter being thus before them, they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage of their debts, they will accept it in satisfaction and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay.

Some one must decide the question of the amount of the dividend and of the discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full. Congress has provided that the debtor and a majority of his creditors, in number and amount, may determine these questions if they can agree upon a compromise.[1] The minority of the creditors must submit to the terms agreed upon by the majority. The terms of the compromise are subject to be approved or disapproved by the judge. The rights of those who are not called upon or who dissent may

[1] B. A. 1898, Sec. 12. Compare R. S. Sec. 5103.

be fully protected by objections properly taken and presented to the judge at the time of the application for an order confirming the composition. The property is distributed under the direction of the court.

This is a much shorter and less expensive method of settling the bankrupt's estate than if the whole machinery of the court, in a full bankruptcy proceeding, is called into use. Where the bankrupt and a majority of his creditors fail to agree upon terms of compromise, or where the court refuses to approve the terms agreed upon, the estate is administered in bankruptcy as otherwise provided by the statute.

§ 242. The power of congress to provide for compositions.

Provisions for facilitating arrangements between bankrupts and their creditors by composition were first introduced in the United States by an amendment to the act of 1867, passed June 22, 1874.[1] The bankrupt acts of 1800, 1841, and the original act of 1867 contained no provisions for a composition by a bankrupt with his creditors.

As soon as the amendment of 1874 was passed, it was attacked upon the ground that congress had exceeded its power and was not authorized by the constitution to provide for a composition by a bankrupt with his creditors for less than the full amount of his debts. The question came before Mr. Justice Hunt, who sustained the validity of the provision in the amendment of 1874.[2] Upon principle, as well as authority, the present provision for a composition can not be successfully attacked on the ground of being in contravention of the constitution of the United States.[3]

[1] 18 Stat. at L. 182, Sec. 17. The provision of this amendment, relating to compositions, is set out in parallel columns with the English act of 1868, *In re* Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

[2] *In re* Reiman, No. 11675 Fed. Cas., 12 Blatch. 562; *In re* Chamberlin, No. 2580 Fed. Cas., 9 Ben. 149.

[3] As to the extent of the power of congress to pass bankrupt laws generally, consult Chap. II.

§ 243. Composition provisions should not be construed broadly.

It has been said [1] that "the composition clause of the law should receive a strict construction, because it is in plain derogation of common right. It compels the dissenting minority of creditors to accept just as much upon their claims as the debtor and the requisite majority see fit to resolve that all shall accept. It takes from the minority the common right of making their owns terms with their debtor, and releases the obligation of the latter to them against their will, and upon terms imposed by the majority. Certainly, therefore the provisions of this clause should not be extended by construction to embrace more than the words clearly and manifestly import." If the proceedings are not had in accordance with the provisions the court can not confirm a composition.[2]

§ 244. When a bankrupt may offer terms of composition.

A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.[1]

The statute does not limit the right to offer terms of composition to any particular class of bankrupts. Any bankrupt is entitled to offer terms of compromise to his creditors. The right extends to corporations [2] and to partnerships.[3] Any member of a partnership, which has been adjudged bankrupt, may submit a proposition of composition to the creditors of the firm and to his individual creditors.[4]

[1] *In re* Shields, No. 12784 Fed. Cas., 4 Dill. 588; *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 109; *In re* Rider, 90 Fed. Rep. 808, 3 Am. B. R. 178.

[2] *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199.

[1] B. A. 1898, Sec. 12*a*.

[2] *In re* Weber, No. 17330 Fed. Cas., 13 N. B. R. 529.

[3] Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560; *In re* Spades, No. 13196 Fed. Cas., 6 Biss. 448.

[4] Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560.

It will be observed that there is a limitation in respect to the time at which such an offer may be made. A bankrupt is not entitled to make such an offer before he has been examined in open court or at a meeting of his creditors, and filed in court a schedule of his property and a list of his creditors. Such an offer may be made at any time after he has complied with these conditions.

A further limitation exists in actual practice. No composition can be effected until claims have been proved by creditors, with whom the compromise may be made.[5] Creditors seldom prove claims before the first meeting, at which the bankrupt is regularly examined and a trustee appointed. Hence, in practice, a composition can rarely be effected until after an adjudication and appointment and qualification of a trustee.

The debtor will not ordinarily be permitted to make a second application for confirmation in case the first one is denied. Where the court refused to permit a composition on the ground that the offer was not sufficiently large, the debtor was permitted in one case to make a better offer and a second application for confirmation, which was granted.[6] He was not permitted to make the second application in that case until he had shown good reason for not having previously made a better offer. Under the act of 1867 it was held that a refusal to grant a discharge was not an estoppel to proceedings in composition.[7] It may be doubted, however, if such is the rule under the present statute. Section 12*d* of the act provides that "the judge shall confirm a composition if satisfied that . . . the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which shall be a bar to a discharge." It would therefore seem that if a discharge had been refused, that such an

[5] *In re* Rider, 96 Fed. Rep. 808, 3 Am. B. R. 178; *In re* Frear, 10 Am. B. R. 109, 120 Fed. Rep. 978; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[6] *In re* Whipple, No. 17513 Fed. Cas., 11 N. B. R. 524.

[7] *In re* Odell, No. 10427 Fed. Cas., 9 Ben. 247; *In re* Joseph, 24 Fed. Rep. 137.

adjudication would be a bar to a subsequent application for confirmation of a composition.

§ 245. Creditors' meeting to consider terms of composition.

Whenever a bankrupt is satisfied that a sufficient number of creditors will accept his offer of terms of composition he may apply to the court for a meeting of the creditors to consider the proposition for composition. The application is made by petition.[1] The petition should be entitled in the court and cause, and state the *per centum* which the bankrupt offers to pay, and that he believes it will be accepted by a majority in number and in value of the creditors whose claims are allowed, and pray that a meeting of the creditors may be duly called to act upon such proposal for a composition. The petition should be signed by the bankrupt.

This petition may be presented to the judge or to the referee. Upon such a petition an order is regularly passed directing a meeting of the creditors to be called. Thereupon the referee should give the creditors at least ten days' notice by mail of the time and place of holding the meeting.[2] At this meeting the proposal for a composition is voted upon by the creditors. All unsecured creditors and secured creditors, to the extent of the balance of their debts after having deducted the amount of their securities, which have been proved and allowed, are entitled to vote.

In the case of an offer of compromise by a partnership or one of the partners, both the firm and individual debtors may vote.[3] The state of the respective debts and funds may be such as to justify this course, and where they are so, it simplifies the proceeding very materially. But if one of any class of the creditors preceives that the other class is about to force upon him an unjust composition he can demand a

[1] Official Form No. 60. See Form No. 107, *post*.

[2] B. A. 1898, Sec. 58*a*. But see *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199.

[3] Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560; *In re* Spades, No. 13196 Fed. Cas., 6 Biss. 448.

separate vote and so protect himself by calling to his assistance those who compose the class to which he belongs.[4]

The creditors are required to pass the resolution for a composition by a majority vote in number and amount of the claims allowed.[5] The resolution must be reduced to writing and should be signed by the creditors, who accept the terms offered, together with the amount of each claim proved and allowed.[6]

If not a sufficient number of creditors attend this meeting the bankrupt may circulate the resolution among his creditors, who have proved claims, and thus secure a majority in number of all the creditors whose claims have been allowed, which number represents a majority in the amount of such claims. The statute requires the acceptance to be in writing. It is not necessarily obtained at a meeting of creditors.[7] Creditors having once accepted a composition offered will not

[4] *In re* Spades, No. 13196 Fed. Cas., 6 Biss. 448.

[5] B. A. 1898, Sec. 56*a*.

In *In re* Rider, 96 Fed. Rep. 808, 3 Am. B. R. 178, Judge Coxe said: "After the bankrupt has been examined and filed a list of his creditors he 'may offer terms of composition to his creditors.' This plainly implies that the offer should be made to all his creditors, whether they have proved their debts or not. It is not essential that proofs shall be made before, or at the first meeting. They may be made at any time within a year.... After the terms are thus made known to all the creditors they have a reasonable time to decide whether they will accept the offer or not. But in order to qualify themselves to vote upon the proposition they are required to prove their claims. The reason for this is obvious; it excludes from the voting all but *bona fide* creditors; it excludes all those who are too indifferent to present their claims and all whose claims are unliquidated, fictitious or exorbitant; it gives all creditors notice, no matter what may be the nature of their claims, and permits them to qualify, if they desire to do so, and assent to the compromise or oppose it, or if they so elect, they may simply withhold their assent."

See also *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[6] *In re* Frear, 10 Am. B. R. 199, 120 Fed. Rep. 978.

[7] Consult *In re* Spillman, No. 13242 Fed. Cas., 13 N. B. R. 214; *In re* Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

As to adjourning the meeting when the best interests of the creditors require it, see *In re* Cheney, No. 2637 Fed Cas., 19 N. B. R. 16.

be permitted to withdraw their consent, in the absence of fraud or misrepresentations.[8]

§ 246. Application for confirmation.

The court is expressly authorized to confirm or reject composition between debtors and their creditors.[1] The bankrupt must apply to the judge and not to the referee for the order confirming the composition.[2]

Before such an application can be made the bankrupt is required to do three things.

First. He must file an acceptance of his offer of compromise in writing by majority in number of all creditors whose claims have been allowed, which must represent a majority in amount of such claims.[3] The manner of obtaining the consent of his creditors is considered in the last section and need not be repeated.

Second. He must deposit the consideration to be paid by the bankrupt to his creditors in such a place as may be designated by the judge, and the same must be subject to the order of the judge.[3]

Third. He must also deposit the money necessary to pay all debts which have priority, and the costs of the proceedings, in such place as may be designated by the judge, and the same must be subject to the order of the judge.[3]

[8] *In re* Levy, 110 Fed. Rep. 744, 6 Am. B. R. 299.

[1] B. A. 1898, Sec. 2, clause 9; *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

[2] B. A. 1898, Sec. 38, clause 4; Gen. Ord. 12.

[3] B. A. 1898, Sec. 12*b*; *In re* Frear, 120 Fed. Rep. 978, 10 Am. B. R. 199, 120 Fed. Rep. 978; *In re* Flynn, 134 Fed. Rep. 145, 13 Am. B. R. 720; *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366.

In re Harvey, 144 Fed. Rep. 901, 16 Am. B. R. 345, Judge Holland said: "The conclusions are: (1) A bankrupt in a composition proceeding is required to deposit, for the purpose of carrying out the composition, sufficient to cover costs, priority claims and expenses, and, in addition, the percentage named, not only on all claims filed before confirmation, but also on all other claims listed by the bankrupt in his schedule; (2) this will include, of course, scheduled claims filed after the composition agreement had been accepted and sufficient will be required to cover the

If the bankrupt fails to do any of these things before applying for an order of confirmation his application should be disregarded.

The consideration should be substantially equivalent to the cash value of the bankrupt's estate, that is, what his estate would pay in bankruptcy. Otherwise the object of a composition is evaded. The theory of a composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts. It is established by all experience that a man can make more out of his own assets than a trustee of more general capacity than he, and entirely honest, can possibly realize. There may be a margin in many cases which the debtor may save by offering less than he might offer, and more than his creditors could obtain by process of law.[4]

The statute does not declare of what the consideration must consist. Manifestly it should be of such a nature that it can be readily distributed by the judge. The most convenient form of consideration is money. But an honest debtor has no money. He has paid in all his money as well as his other property as a part of his estate. If he is required to deposit a money consideration in all cases, few compositions could be effected. In such cases he is usually dependent upon his friends.

A practical consideration consists in promises to pay money at specified dates, secured by notes, reorganization bonds, or other negotiable paper,[5] or possibly stock in a new

same percentage upon them; (3) the bankrupt is not required to deposit sufficient to secure a percentage on secured claims, nor for any supposed deficiency, if it has not yet been ascertained and filed."

[4] *Ex* parte Jewett, No. 7302 Fed. Cas., 2 Low. 393; *In re* Whipple, No. 17513 Fed. Cas., 11 N. B. R. 524; *In re* Weber Furniture Co., No. 17330 Fed. Cas., 1 3N. B. R. 529.

[5] Consult *In re* Langdon, No. 8058 Fed Cas., 2 Low. 387; *In re* Reiman, No. 11673 Fed. Cas., 7 Ben. 455, affirmed in No. 11675 Fed. Cas., 12 Blatch. 562; *In re* Lewis, No. 8314 Fed. Cas., 14 N. B. R. 144; *In re* Hurst, No. 6925 Fed. Cas., 1 Flipp. 162; *In re* Wronkow, No. 18105 Fed. Cas., 15 Blatch. 38.

company.[6] Creditors who have confidence in their debtor may be willing, and may consider it for their own best interests to accept a paper consideration and permit the bankrupt to continue his business. That negotiable paper may be used is implied by Section 14*c* of the act, which provides that "the confirmation shall discharge the bankrupt from his debts other than those agreed to be paid by the confirmation of the composition." It is significant that the word "consideration" is used, and in the next clause relating to debts having priority and the cost of the proceedings the word "money" is used, as if congress intended to make a distinction in the character of the two deposits.

It will be observed that money only can be deposited for the purpose of paying debts which have priority and the cost of the proceeding.[7] A sufficient sum to pay the debts which have priority and the costs of the proceeding must be deposited. This is one of the conditions precedent to obtaining a confirmation of the composition.[8] The rule seems to have been otherwise under the act of 1867.[9]

When the bankrupt has complied with the conditions mentioned above he may apply for a confirmation of the composition. The application is made by petition addressed to the judge.[10] It should state that the bankrupt has been examined in open court or at a meeting of his creditors; that he has filed in court a schedule of his property and list of his creditors; that he has offered terms of composition to his creditors, which have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in the amount of such claims; and that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all

[6] *In re* Woodend, 133 Fed. Rep. 593, 12 Am. B. R. 768, this was denied because of the character and value of the stock.

[7] B. A. 1898, Sec. 12*b*.

[8] *In re* Harris, 9 Am. B. R. 20, 117 Fed. Rep. 575.

[9] *In re* Chamberlin, No. 2580 Fed. Cas., 9 Ben. 149.

[10] Gen. Ord. 12; Official Form No. 61; see Form No. 111, *post;* B. A. 1898, Sec. 38, clause 4.

debts, the costs of the proceedings, and the amount thereof, have been deposited subject to the order of the judge, in a certain depository, naming it, and conclude with a prayer that the court confirm the said composition. The petition is signed by the bankrupt without verification.

The judge fixes a date and place, with reference to the convenience of the parties in interest, for the hearing of such application for the confirmation of the composition. The creditors are entitled to have at least ten days' notice by mail of such hearing.[11] This notice may be served by the referee or by the clerk as the judge may direct. The notice is usually in the form of an order to show cause why the composition should not be confirmed.

§ 247. Objections to a confirmation.

General creditors are entitled to object to a confirmation of a composition, but secured creditors are not entitled to object. They have no interest in the general fund. A trustee is not authorized to interfere in such proceeding beyond furnishing such information concerning the estate under his charge and the administration thereof as may be requested. He can not object to a confirmation.[1] If the creditors interested in composition proceedings fail to attend to their interest in time the courts will not relieve them from the consequences of their neglect, except they made a clear case for equitable interference in their behalf.[2]

When a creditor desires to oppose the application of a bankrupt for the confirmation of a composition he must enter his appearance in opposition thereto on the day when the creditors are required to show cause, and must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special

[11] B. A. 1898, Sec. 58*a*.

[1] Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[2] *In re* Wronkow, No. 18105 Fed. Cas., 15 Blatch. 38; the objecting creditor did not attend the meeting called to consider the proposal for composition.

order of the judge.[3] The form of the specification in opposition to a confirmation is substantially the same as in opposition to a discharge.[4]

There are three general grounds for opposing the confirmation of a composition by a bankrupt by his creditors. They are:[5]

First. That the composition is not for the best interests of the creditors.

Second. That the bankrupt has been guilty of an act or failed to perform some of the duties which would be a bar to his discharge and

Third. That the composition has been procured by fraud.

First: Because not for the Interest of the Creditors.—The first ground of opposition to a confirmation is that it is not for the interest of the creditors.[6] The interest to be considered is that of all the general creditors and not any particular creditor or class of creditors. It is the creditors who have proved their claims at the time the matters are being considered.

The statute evidently imposes upon the judge the duty of examining the offer and acceptance and ascertaining whether the composition is for the best interests of the creditors. The question is, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy.[7] In determing this question the court should consider the amount of debts, the amount and character of the assets, the nature of the business that is to be carried on, and many other cir-

[3] Gen. Ord. 32.

[4] Sec. 280, *post;* Official Form No. 58; see Form No. 157, *post;* City National Bank of Dallas v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736; Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

[5] B. A. 1898, Sec. 12*d*.

[6] B. A. 1898, Sec. 12*d*.

[7] *Ex parte* Jewett, No. 7303 Fed. Cas., 2 Low. 393; *In re* Whipple, No. 17513 Fed. Cas., 2 Low. 404; *In re* Weber Furniture Co., No. 17330 Fed. Cas., 13 N. B. R. 529, reversed on appeal, No. 17331 Fed. Cas., 13 N. B. R. 559; *In re* Reiman, No. 11673 Fed. Cas., 7 Ben. 455, on appeal, No. 11675 Fed. Cas., 12 Blatch. 562.

cumstances. If the court is satisfied upon the hearing that the composition offered would pay creditors very considerably less than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interest of creditors. In determining this question the courts will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings with compulsory sales and expense of administration.[8] In England the determination of the creditors is final, in the absence of fraud, and it has been said that[9] "it will be found that the practical administration of our law must be very similar." The fact that a majority of the creditors have consented to the terms offered by the bankrupt, is *prima facie* evidence that it is for the best interest of all, and the burden of proof is then upon the dissenting creditors to show cause for not confirming the composition.[10]

How far congress intended to protect creditors against each other, and how far the court is to inquire into motives, are questions of no little difficulty. The law which enables a majority of creditors to accept a composition with their debtor, to which other creditors do not consent, and so to bind such dissentients, assumes as an essential condition that it shall in all respects be just. Some creditors may agree

[8] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245; *In re* Arrington Co., 8 Am. B. R. 64, 113 Fed. Rep. 498.

[9] *Ex parte* Jewett, No. 7303 Fed. Cas., 2 Low. 393, and quoted with approved in *In re* Weber, No. 17331 Fed. Cas., 13 N. B. R. 559.

[10] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245; *In re* Arrington Co., 113 Fed. Rep. 498, 8 Am. B. R. 64, 86 out of 89 creditors accepted the terms of composition, and only one objected. *In re* Weber Furniture Co., No. 17330 Fed. Cas., 2 Low. 404, reversed on appeal on the ground that the composition was *prima facie* evidence which was not rebutted by the evidence; No. 17331 Fed. Cas., 13 N. B. 8. 559. As to the weight to be given an acceptance by the requisite majority of creditors who are acquainted with all the facts, see also *In re* Greenebaum, No 5769 Fed. Cas., 1 Chi. Law Jour. 599.

to the composition without much inquiry, upon the ground that bankruptcy is to be avoided at all risks; some out of kindness to the bankrupt; some from a conviction that the offer is for their own interest as distinguished from general interest. Mr. Bacon, chief judge in bankruptcy, speaking on this point, said, [11] "Benevolence, generosity and forbearance may be well exercised—with this restriction, however, that the practice of these moral virtues is not made at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty."

Whether the composition is for the best interests of the creditors usually turns upon the question of the adequacy or inadequacy of the terms offered.[12] Where the court was satisfied that the net assets would amount to eighteen thousand dollars, and the debtor offered to divide eleven thousand dollars, the court refused to confirm the composition.[13] Where it was shown that a debtor could pay more than seven shillings in the pound and offered to pay one shilling, and four creditors out of five had agreed to the arrangement, the court set aside the deed of arrangement.[14]

In determining the question whether the proposed composition is for the best interests of creditors the judge is vested with the exercise of discretion. It is nevertheless a sound judicial discretion.[15]

Second: Because of Grounds which would Bar a Discharge.—The second ground for opposing a confirmation is that the bankrupt has been guilty of an act or failed

[11] *Ex parte* Williams, 10 L. R. Eq. 61.

[12] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

[13] *In re* Whipple, No. 17513 Fed. Cas., 2 Low. 404. See also *Ex parte* Jewett, No. 7303 Fed. Cas., 2 Low. 393; *In re* Reiman, No. 11673 Fed. Cas., 7 Ben. 455.

[14] *Ex parte* Williams, 10 L. R. Eq. 57. Consult also *Ex parte* Cowen, 2 L. R. Chan. App. 563; Hart v. Smith, 4 L. R. Q. B. 61; *Ex parte* Greaves, 5 L. R. Chan. App. 326; *Ex parte* Duigman, 11 L. R. Eq. 604; *Ex parte* Levy & Co., 11 L. R. Eq. 619.

[15] Adler v. Jones (C. C. A. 6th Cir.), 109 Fed. Rep. 967, 6 Am. B. R. 245.

to perform some of the duities which would be a bar to his discharge.[16] A bankrupt is not entitled to a discharge when he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.[17] These grounds are discussed in connection with an application for a discharge, to which the reader is referred.[18]

By the amendment of Feb. 5, 1903,[19] the grounds for refusing a discharge were amended to prevent a discharge when the bankrupt has, *first*, committed an offense punishable by imprisonment as herein provided; or, *second*, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or, *third*, obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or, *fourth*, at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or, *fifth*, in voluntary proceedings been granted a discharge in bankruptcy within six years; or, *sixth*, in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court. These objections can be made to confirming a composition only in cases begun since the amendment.

The statute does not limit the time for making a composition to that within which a discharge may be granted. It

[16] B. A. 1898, Sec. 12*d*; *In re* Godwin, 10 Am. B. R. 252, 122 Fed. Rep. 111. The rule under the act of 1867 was otherwise. *In re* Haskell, No. 6192 Fed. Cas., 11 N. B. R. 164; *In re* Becket, No. 1210 Fed. Cas., 2 Woods, 173.

[17] B. A. 1898, Sec. 14*b*.

[18] Sees. 281-283.

[19] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

would therefore seem that an objection to the confirmation upon the ground that a discharge was barred by limitation of time would not be sufficient to prevent the confirmation of a composition. The refusal to confirm a composition must be founded upon acts or an omission to perform duties which would bar a discharge, and not merely for the reason that an application for a discharge can not be made. It has been refused because the bankrupt failed to keep books.[20]

THIRD: BECAUSE IT WAS OBTAINED BY FRAUD.—It is an essential condition to the validity of a composition that it shall be in all respects just. Any taint of fraud, whether it consists in concealment, misrepresentation, inequality or injustice wholly vitiates the composition and frees the persons who would otherwise be bound by it.

The court will not hesitate to refuse to confirm a composition when the debtor has deceived the creditors into an agreement, which they would probably not have made had the facts been honestly and fairly before them. Thus it is a good ground for opposing a confirmation that a creditor is induced to sign an acceptance by reason of a present consideration or an expectation of advantage offered by the bankrupt,[21] or by a third person, without the actual knowledge of the bankrupt, when the relation of such person to the bankrupt is such as to arouse suspicion, as an employee or a relation.[22] But the mere fact that a brother procures an assignment of claims openly will not prevent a confirmation when it appears after throwing out his claims that a majority of the creditors have accepted the terms offered.[23] A bankrupt may induce his friends to pay more in composition than his estate would pay in bankruptcy. Such a composition should be confirmed.[24] A creditor may purchase claims

[20] *In re* Olman, 134 Fed. Rep. 681, 13 Am. B. R. 395.

[21] *In re* Sawyer, No. 12305 Fed. Cas., 2 Low. 475; *In re* Jacobs, No. 7159 Fed. Cas., 18 N. B. R. 48.

[22] *Inn re* Bennett, No. 1312 Fed. Cas., 8 Ben. 561.

[23] *In re* Walshe, No. 17118 Fed. Cas., 2 Woods, 225.

[24] *In re* Snelling, No. 13140 Fed. Cas., 19 N. B. R. 120.

for the purpose of using them in opposing a composition.[25]

When the requisite majority of the creditors agree to a composition for much less than the bankrupt is able to pay, fraud may be presumed. Either the assenting creditors know, or they do not know, that the debtor is able to pay a composition of a larger amount than that which he has proposed. If they do not know the debtor's means, it can only be by reason of the debtor's suppression of facts material and essential to the exercise by them of their free will, and in such a case they would be entitled to repudiate the consent, which was obtained from them by such suppression. If on the other hand they do know the extent of the debtor's ability to satisfy the debts due to them and other creditors, and agree to release—and join in compelling unwilling creditors to release—the debtor upon payment of a composition grossly disproportionate to the debtor's means, they willingly and intentionally make themselves parties to a fraud by which the dissentient creditors are prejudiced. In such cases the court should refuse to confirm.[26] Where a bankrupt's assets are so trifling that practically there would be no dividend, a composition may be successfully opposed against an attempt by friendly creditors to force a composition upon opposing creditors.[27]

It is undoubtedly a good ground for not confirming a composition if any person has used a false claim in composition personally or by agent, proxy, or attorney, or as agent, proxy,

[25] *In re* Jewett, No. 7303 Fed. Cas., 2 Low. 393, the court refused to confirm a composition with leave to call a new meeting. Between the order of the court and the time of calling a new meeting an opposing creditor purchased a sufficient number of claims to defeat the confirmation. Judge Lowell said: "I think some illegal motive should be shown beyond the mere desire to defeat the composition upon the ground that it is not for the best interests of the creditors to accept it."

[26] As to what is too great a margin, see "because it is not for the interest of creditors" above, in this section.

[27] *In re* Russell, 10 Chan. Ap. 255, 263; *In re* Hannahs, No. 6033 Fed. Cas., 8 Ben. 533, the court refused to confirm a composition of fifty cents for every hundred dollars where the bankrupt had been refused a discharge.

or attorney.[27] Such person also is liable to imprisonment for a period not to exceed two years for the offense.[28]

Where fraud exists the creditors are not bound to raise the question at the time of confirmation. Fraud vitates the whole confirmation and constitutes the ground for setting it aside. The objections founded upon fraud may be raised either at the time of confirmation or upon an application to set aside a confirmation previously made. Cases upon the question of whether a confirmation may be set aside or not may be profitably consulted in this connection.[29] It is obvious that fraud sufficient to set aside a composition is sufficient to prevent a confirmation.

§ 248. The hearing of objections.

When objections are properly taken to the confirmation of a composition there should be a hearing before the judge.[1] The creditors are entitled to a ten days' notice by mail of such hearing.[2] At this hearing evidence may be introduced before the judge, as he may direct, either orally or by depositions or affidavits, and counsel may be heard in support of and against the specification of the grounds of opposition. The judge may refer the matter to a referee with directions to report the facts, but the judge must make the order.

The object of this hearing is to satisfy the judge that the composition is for the best interests of the creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge and that the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden.[3] If satisfied of these things it is his duty to confirm the composition.[3] Otherwise he should refuse to confirm it.

[28] B. A. 1898, Sec. 29, clause 3.

[29] As to when a composition may be set aside, see Sec. 252, *post*.

[1] B. A. 1898, Sec. 12*c*, and Sec. 38, clause 4. Gen. Ord. 12, par. 3.

[2] B. A. 1898, Sec. 58*a*.

[3] B. A. 1898, Sec. 12*d*.

§ 249. The order of confirmation.

The statute provides that the judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as provided by the statute, or by any means, promises, or acts therein forbidden.

Where the proceedings have been regular, and the bankrupt has complied with all the conditions specified in the statute, and no opposition is made by the creditors, a *prima facie* case is made which ordinarily satisfies the court that the bankrupt is entitled to have a composition confirmed. The court will thereupon regularly pass an order confirming the composition.[1] This order usually recites the several conditions which have been complied with by the bankrupt. The order concludes "it is therefore hereby ordered that the said composition be and the same is hereby confirmed."[1]

In case there is opposition to the confirmation, and it appears from the evidence that the acceptance of the offer of terms was duly made by the requisite number of creditors, and the court is satisfied that the creditors were fully and honestly advised of the true condition of the bankrupt's affairs, so that they acted intelligently and understandingly in full view of the facts, it will ordinarily confirm the composition.[2] On the other hand, if the court is satisfied from the evidence that the composition has not been honestly made as between the debtor and the creditors, or that it is not for the best interest of them all, or that it appears that the bankrupt has committed or omitted to do some act which would bar

[1] Official Form No. 62; see Form No. 113, *post*; *In re* Frear, 10 Am. B. R. 109, 120 Fed. Rep. 978.

[2] *In re* Reiman, No. 11675 Fed. Cas., 12 Blatch. 562; *In re* Greenebaum, No. 5769 Fed. Cas., 1 Ch. L. J. 599; *In re* Walshe, No. 17118 Fed. Cas., 2 Woods 225; *In re* Weber Furniture Co., No. 17331 Fed. Cas., 13 N. B. R. 599; *In re* Spades, No. 13196 Fed. Cas., 6 Biss. 448.

his discharge, or if the proceedings have been irregular,[3] the court should refuse to pass an order of confirmation. Whenever a composition is not confirmed, the estate is administered in bankruptcy as otherwise provided by the statute.[4] Whether the order shall be granted or refused, rests in the sound judicial discretion of the judge. The judge may provide for a dispute or an unliquidated claim in composition cases.[5]

A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[6]

It has been held that an appeal lies in favor of a bankrupt from an order refusing a confirmation of a composition.[7]

§ 250. The effect of a confirmation of a composition.

The confirmation of a composition has the effect:

First, to revest in the bankrupt the title to his estate and property and discharge the trustee;[1] *second*, to discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.[2] No other discharge than an order of confirmation is needed.[3]

The confirmation of a composition has the effect of discharging the bankrupt from claims provable in bankruptcy,

[3] *In re* Asten, No. 594 Fed. Cas., 8 Ben. 350; see also *In re* Henry, No. 6370 Fed. Cas., 9 Ben. 449; *In re* Rodger, No. 11992 Fed. Cas., 18 N. B. R. 381.

[4] B. A. 1898, Sec. 12*e*.

[5] *Ex parte* Trafton, No. 14133 Fed. Cas., 2 Low. 505.

[6] B. A. 1898, Sec. 21*f*. See also as to the conclusiveness of an order of confirmation, Smith v. Engle, 14 N. B. R. 481.

[7] U. S. v. Hammond, 104 Fed. Rep. 862, 4 Am. B. R. 736. But see Ross v. Saunders, 105 Fed. Rep. 915, 5 Am. B. R. 350.

[1] B. A. 1898, Sec. 70*f*; Legion v. Allen, 56 Miss. 632.

[2] B. A. 1898, Sec. 14*c*. Consult Liebke v. Thomas, 116 U. S. 605, 29 L. Ed. 744.

[3] *In re* Becket, No. 1210 Fed. Cas., 2 Woods, 173.

although the creditors did not actually prove their debts or participate in the composition proceeding.[4] It releases the bankrupt from such debts only as a discharge.[5] A discharge in bankruptcy releases a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; are liabilities for obtaining property by false pretenses, or false representations, or for wilful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or criminal conversation; have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.[6]

The confirmation of a composition will regularly discharge a debt created by fraud.[7] It will not discharge a debt or liability incurred in and by a bankrupt acting in a fiduciary capacity,[8] nor a stockholder's contingent liability not scheduled,[9] nor the liability of a person who is a co-defendant with or guarantor, or in any manner a surety for a bankrupt,[10] nor the debt of a creditor whose name does not appear in the statement of the debtor or otherwise in the composition proceedings and whose debt is not mentioned,[11] unless such person had

[4] Glover Grocery Co. v. Dorne, 116 Ga. 216, 8 Am. B. R. 702; McGehee v. Hentz, No. 8794 Fed. Cas., 19 N. B. R. 136.

[5] Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536; Bayly v. University, 106 U. S. 11, 27 L. Ed. 97.

[6] B. A. 1898, Sec. 17, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

[7] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659.

The rule was otherwise under the law of 1867; Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536.

[8] Bayly v. University, 106 U. S. 11, 27 L. Ed. 97.

[9] Flower v. Greenebaum, 2 Fed. Rep. 897.

[10] B. A. 1898, Sec. 16; Moore v. Stanwood, 98 Ill. 605; *In re* Burchell, 4 Fed. Rep. 406.

[11] Broadway Trust Co. v. Manheim (Sup. Ct. N. Y.), 14 Am. B. R. 122; Harrison v. Gamble, 69 Mich. 96; Robinson v. Soule, 56 Miss. 549. See also *In re* Blackmore, 11 Fed. Rep. 412.

actual knowledge of the proceedings in bankruptcy. Such notice to a creditor, whose claims are omitted from the schedules, should be given before application for confirmation is filed.[12]

Where the consideration consists of negotiable paper, and the bankrupt does not fulfill his obligations and agreements in connection therewith, the creditor may recover his whole debt from the bankrupt.[13] The confirmation of a composition does not release the bankrupt from debts agreed to be paid by the terms of the composition. If the bankrupt fails to make good his part the consideration fails and the whole debt revives.

The order confirming a composition is not a bar to a suit to collect the whole debt, when the composition was procured by fraud.[14] The reason for this rule is that fraud vitiates the whole composition and leaves the debtor and the bankrupt in the same position that they were before the composition was attempted.

The composition proceedings will not operate to deprive a secured creditor of the right, after exhausting his own security, to assert against the bankrupt a claim for deficiency.[15] Such proceedings will not affect a vested right or security.[16] Secured creditors are not parties to the composition.

An agreement or note entered into secretly for the purpose of obtaining a composition with creditors can not be enforced against the bankrupt, because the consideration is illegal.[17]

A composition may be pleaded in bar of actions upon debts

[12] Broadway Trust Co. v. Manheim (Sup. Ct. N. Y.), 14 Am. B. R. 122.

[13] *In re* Negley, 20 Fed. Rep. 499; *In re* Hurst, No. 6925 Fed. Cas., 1 Flip. 462; Ransom v. Geer, 12 Fed. Rep. 607.

[14] Brownsville Manufacturing Co. v. Lockwood, 11 Fed. Rep. 705; Pukpe v. Churchill, 91 Mo. 81; *Ex parte* Halford, 19 L. R. Eq. 436.

[15] Paret v. Ticknor, No. 10711 Fed. Cas., 4 Dill. 111, per Mr. Justice Miller; Cavanna v. Bassett, 3 Fed. Rep. 215.

[16] *In re* Stowell, 24 Fed. Rep. 468.

[17] Carey v. Hess, 112 Ind. 398; Tirrell v. Freeman, 139 Mass. 297; Blasdel v. Fowle, 120 Mass. 447; Woodman v. Stowe, 11 Bradw. (Ill. Ap. Ct.) 613; Tinker v. Hurst, 70 Mich. 159.

discharged. In order to be available as defense it must be pleaded.[18]

§ 251. Proceedings after a confirmation of a composition.

Upon the confirmation of a composition the consideration is distributed as the judge shall direct, and the case dismissed.[1]

The form of order for distribution on composition is prescribed by the supreme court.[2] It provides that the deposit shall be distributed by the clerk of the court as follows: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings;[3] 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in the case. Only those creditors who prove their claims within one year from the date of adjudication can have dividends from the estate, or assert a right to share in the funds paid in composition. The officers of the court can not know what amount should be paid to a creditor, or, indeed, who are creditors, except upon proof of their claims in the time and manner provided by law. The bankrupt is entitled to the money remaining in court unclaimed after the expiration of the year in which proof of claims could be made, and the creditor cannot be heard to say that it was not in fault in respect to the failure to present its claim. The language of the statute permits no exceptions to its terms.[4] A claimant is entitled to property leased to bankrupt and which is not used in the composition.[5] The services of a trustee are dis-

[18] Broadway Trust Co. v. Manheim (Sup. Ct. N. Y.), 14 Am. B. R. 122; *In re* Tooker, No. 14096 Fed. Cas., 8 Ben. 390. See Pleading a discharge, Sec. 301, *post*.

[1] B. A. 1898, Sec. 12*c*.

As to set-offs in composition, see *In re* Lissburger, 2 Fed. Rep. 153; *In re* Purcell, No. 11470 Fed. Cas., 18 N. B. R. 447; *Ex parte* Howard Nat. Bank, No. 6764 Fed. Cas., 2 Low. 487; *Ex parte* Harris, No. 6109 Fed. Cas., 2 Low. 568.

[2] Official Form No. 63; see Form No. 114, *post*.

[3] *In re* Harris, 9 Am. B. R. 20, 117 Fed. Rep. 575.

[4] *In re* Brown, 123 Fed. Rep. 336, 10 Am. B. R. 588; *In re* Lane, 125 Fed. Rep. 772, 11 Am. B. R. 136.

[5] *In re* Winship Co. (C. C. A. 7th Cir.), 120 Fed. Rep. 93, 9 Am. B. R. 638.

pensed with. When the property has thus been distributed, the case is dismissed by the judge and the proceedings are at an end.

Upon the confirmation of a composition offered by a bankrupt the title to his property thereupon revests in him.[6] The title is passed by operation of law, and no deed is necessary to convey. A certified copy of an order confirming a composition constitutes evidence of the revesting of the title of his property in the bankrupt, and if recorded imparts the same notice that a deed from the trustee to the bankrupt if recorded would impart.[7]

§ 252. Setting aside a confirmation.

The courts of bankruptcy are expressly given power to set aside a composition and to reinstate the case.[1] The application to set aside a confirmation should be made to the judge, and not to the referee.[2]

No other court can set aside a composition except the court of bankruptcy which confirmed the composition. An order of confirmation of a composition can not be assailed collaterally in any other court. The statute expressly provides that "a certified copy of an order confirming or setting aside a composition, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." [3]

The application is made by petition, which should be entitled in the court and cause. The creditors assenting to the confirmation as well as the bankrupt are proper, if not essential, parties defendant.[4] It should set forth the grounds upon which the composition is asked to be set aside. The

[6] B. A. 1898, Sec. 70*f*.

[7] B. A. 1898, Sec. 21*g*.

[1] B. A. 1898, Sec. 2, clause 9; *In re* Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

[2] B. A. 1898, Sec. 13.

[3] B. A. 1898, Sec. 21*f*.

[4] *In re* Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 13 Am. B. R. 193; see also Marshall Field & Co. v. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693.

only ground upon which a composition can be set aside and the case reinstated is when it is made to appear upon the trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.[5] The petition should conclude with a prayer that the composition be set aside and be signed by a "party in interest." The word "creditors" was used in the former act.[6] The word "parties in interest" is a broader term, but in practice the application usually is made by a creditor. But a creditor who has assigned his claim is not then a party in interest.[7] A secured creditor can not make an application because he has no interest in the composition.[8] The petition must be verified. An affidavit "on information and belief" is not sufficient.[9]

The petition must be filed in the clerk's office within six months after the composition has been confirmed.[10] A trial is had upon notice to all creditors.[11] Evidence may be introduced and counsel heard for and against the petition. If the allegations in the petition are supported by sufficient evidence the court will order the composition set aside and the case reinstated,[12] and if not, it will order the petition dismissed.[13] A composition will not be set aside on the ground that a creditor had failed to get notice of the proceedings because his address was misstated in the bankrupt's schedule by mistake.[14] A composition may be set aside where a trustee

[5] B. A. 1898, Sec. 13. As to the sufficiency of a petition in this regard see *In re* Roukous, 128 Fed. Rep. 645, 12 Am. B. R. 128.

[6] R. S. Sec. 5103.

[7] *In re* Wrisley Co. (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 13 Am. B. R. 193.

[8] *In re* Scott, No. 12519 Fed. Cas., 15 N. B. R. 73.

[9] *In re* Roukous, 128 Fed. Rep. 645, 12 Am. B. R. 128.

[10] B. A. 1898, Sec. 13.

[11] *In re* Diggles, No. 3905 Fed. Cas., 8 Ben. 36; *Ex parte* Hamlin, No. 5993 Fed. Cas., 2 Low. 571.

[12] B. A. 1898, Sec. 2, clause 9; Fairbanks v. Amoskeag Bank, 38 Fed. Rep. 630; *Ex parte* Williams, 10 L. R. Eq. 57.

[13] City Bank v. Doolittle (C. C. A. 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 736; *In re* Shaw, 9 Fed. Rep. 495; Pool v. McDonald, No. 11268 Fed. Cas., 15 N. B. R. 560.

[14] *In re* Rudnick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

joins with the bankrupt to effect a composition to the detriment of the creditors by false representations as to the assets.[15]

Whenever a composition has been set aside the creditors, at their first meeting thereafter, must appoint one or three trustees of such estate,[16] and fix the amount of the bonds as in the first instance. The trustee, upon his appointment and qualification, is vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition.[17]

The case then proceeds as if no composition had been made. The property is distributed in the same manner, except that in the event of the confirmation of a composition being set aside, the property acquired by the bankrupt, in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[18]

§ 253. Arbitration and compromise.

The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate,[1] or he may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.[2]

Whenever a trustee makes application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the

[15] *In re* Wrisley Co., 133 Fed. Rep. 388, 13 Am. B. R. 193.

[16] B. A. 1898, Sec. 44.

[17] B. A. 1898, Sec. 70*d*.

[18] B. A. 1898, Sec. 64*c*.

[1] B. A. 1898, Sec. 26*a*. Compare R. S. Sec. 5061.

[2] B. A. 1898, Sec. 27; *In re* Heyman, 108 Fed. Rep. 207, 5 Am. B. R. 808.

other party, the application must clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.[3]

Whenever it may be deemed for the benefit of the estate of a bankrupt to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which is given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.[4]

Under the act of 1867 it was held that such applications must be made to the judge.[5] Under the present act the referee is authorized, subject always to a review by the judge, within the limits of his district as established from time to time, to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges as are by the bankrupt statute conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as otherwise provided by statute.[6] It seems, therefore, that an application to compromise or to submhit to arbitration any controversy arising in the administration of the estate may be made to the referee or to the judge.

In either case a ten days' notice should be given by mail to the creditors, of the time and place of the hearing on the petition.[7] The notice is usually in the form of a rule to

[3] Gen. Ord. 33.

[4] Gen. Ord. 28.

[5] *In re* Graves, No. 5700 Fed. Cas., 2 Ben. 100.

[6] B. A. 1898, Sec. 38, clause 4.

[7] B. A. 1898, Sec. 58*a*; *In re* Hoole, 2 Fed. Rep. 496.

show cause. At the hearing the court may hear testimony and arguments of counsel in support of and against the petition, and pass an order granting or refusing to grant the prayer of the petition. It may be doubted if the court can by a general order authorize the trustee to compound all doubtful claims, with the consent of a committee of the creditors.[8] The proceedings should be in accordance with the provisions of the statute and general orders.

When leave is granted to submit a controversy to arbitration, three arbitrators are chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court appoint the third arbitrator.[9] The arbitrators, upon inquiry, consider the controversy, and should report their finding in writing. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court, and have like force and effect as the verdict of a jury.[10] It is subject to be set aside or adjudged upon by the court as a verdict would be.[11]

[8] See *In re* Dibblee, No. 3885 Fed. Cas., 3 Ben. 354.

[9] B. A. 1898, Sec. *26b; In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

[10] B. A. 1898, Sec. *26c*.

[11] *In re* McLam, 97 Fed. Rep. 922, 3 Am. B. R. 245.

CHAPTER XXIV.

HOW TO REDUCE THE ESTATE TO MONEY.

§ 254. The general power of a trustee to collect and reduce estates to money.

The trustee is required to collect and reduce to money the property of the estate for which he is trustee.[1] The courts of bankruptcy are given power to cause the estates of bankrupts to be collected, reduced to money and distributed and to determine controversies in relation thereto, except as otherwise provided by the statute.[2]

It is the duty of the bankrupt to deliver to the trustee as soon as he is appointed and qualified all of his property, real and personal, to be distributed among his creditors. If he fails or refuses to do this he may be cited to answer a rule to show cause and the court may order him to turn over any such property in his possession or under his control to the trustee and enforce the order by commitment if he fails to obey it.[3] The same procedure may be had to obtain property in the possession of an agent or bailee of property of the bankrupt, who does not claim title to, or an interest in the property in question.[4] An assignee for the benefit of creditors is such an

[1] B. A. 1898, Sec. 47, clause 2.

[2] B. A. 1898, Sec. 2, clause 7. Compare R. S. Sections 5062 to 5066, Act of June 22d, 1874, 18 Stat. at L. 178. As to the jurisdiction of a court of bankruptcy in this respect, see Sec. 17 *et seq.*, *ante*.

[3] Schweer v. Brown (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 12 Am. B. R. 178; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 4 Am. B. R. 153; Ripon Knitting Wks. v. Schrieber, 101 Fed. Rep. 810, 4 Am. B. R. 299; *In re* Schlesinger (C. C. A. 2d Cir.), 102 Fed. Rep. 117, 4 Am. B. R. 361; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re* Greenberg, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Gerstel, 123 Fed. Rep. 166, 10 Am. B. R. 411.

[4] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Feldser, 134 Fed. Rep. 307, 14 Am. B. R. 216; *In re* Moore, 104 Fed. Rep. 869, 5 Am. B. R. 151.

agent.[5] He may be required in a summary proceeding to deliver to the trustee any property of the bankrupt in his possession by reason of the assignment.[6] Where he has transferred any part of such property to another person who claims title to, or an interest in it, the trustee must resort to plenary action to recover it.[7]

The bankrupt may be required by order of the court to sign papers necessary to make his property available as assets, as to execute an instrument necessary to effectuate a sale of a seat in a stock exchange,[8] or the transfer of a liquor license,[9] or the transfer of a license of a stall in market.[10]

Where the property claimed to belong to the estate of the bankrupt is in the possession of another person claiming title to, or an interest in it, the trustee must resort to a plenary action in a court, either state or federal, having jurisdiction. This is necessary to recover property transferred as a preference or in fraud of creditors,[11] or to recover debts due the estate.[12] The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.[13]

Where a great advantage will result to the estate and within a reasonable time, the trustee may be permitted to expend money for the purpose of putting the estate or any part of

[5] Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

[6] *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Smith, 92 Fed. Rep. 135, 2 Am. B. R. 9.

[7] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[8] *In re* Hurlbutt, Hatch & Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 504, 13 Am. B. R. 50.

[9] *In re* Fisher, 98 Fed. Rep. 89, 3 Am. B. R. 406; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412.

[10] *In re* Emrich, 101 Fed. Rep. 231, 4 Am. B. R. 89.

[11] See Secs. *202* and *203a, ante,* where the nature of the suit and the court in which it should be brought are considered.

[12] *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427, Judge Hazel held that a mogtgagee in possession before he had right to be under the mortgage did not constitute him an adverse claimant.

[13] B. A. 1898, Sec. 26, Gen. Ord. 33.

it in a merchantable form,[14] as by cutting timber, harvesting crops, and the like; and so of finishing unfinished goods. The court may authorize the trustee to conduct the business of the bankrupt for limited periods, if necessary for the best interests of the estate.[15]

The estate of the bankrupt must be reduced to money in order to distribute it *pro rata* among his creditors. The estate may come to the trustee loaded with burdens. There may be valid mortgages or other liens on it and there may be liens and mortgages whose validity is doubtful. Whatever interest the bankrupt has in such property must be determined and reduced to money. It is regularly done by selling the property.

The trustee may, "under the direction of the court," sell any property of the estate in his possession subject to[16] or free from liens,[17] even where it is beyond the territorial jurisdiction of the court ordering the sale.[18] A receiver has been permitted to sell property in his possession under an order of court,[19] but he can not sell property of the bankrupt in the possession of a person claiming to own it.[20] Whenever it is necessary or advisable in the opinion of the trustee to make a sale, he should apply to the judge or referee, usually the

[14] Foster & Ames, No. 4965 Fed. Cas., 1 Low. 313.

[14] Foster v. Ames, No. 4965 Fed. Cas., 1 Low. 313.

[15] B. A. 1898, Sec. 2, clause 5, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[16] Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; *In re* Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 10 Am. B. R. 236; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[17] *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767; *In re* Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 12 Am. B. R. 248; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

[18] *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727.

[19] *In re* LeVay, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412.

[20] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 8 Am. B. R. 751, 125 Fed. Rep. 513, 11 Am. B. R. 104.

referee,[21] for permission to sell property, specifying particularly what property is to be sold. But where the trustee made a sale without authority and the sale was confirmed the confirmation was held equivalent to a prior order.[22] The supreme court has prescribed forms of petitions and orders for the sale by auction of real estate,[23] for the redemption of property from lien,[24] for the sale of property subject to lien,[25] for a private sale of property,[26] and for a sale of perishable property.[27] The creditors must have ten days' notice of the proposed sale.[28]

Where the property is sold subject to liens, the purchaser takes only the bankrupt's interest in the property, whatever that may be, and the secured creditor's lien on the property is preserved.[29] Where it is sold free of liens, the secured creditor can assert his right to the proceeds before the referee after the sale, when and where his claim can be heard and its priority awarded.[30] The purchaser takes a clear title to the property.

§ 255. Unencumbered property.

Under the general power conferred upon the court and trustee, such parts of the estate, real and personal, as come

[21] *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366; *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 578, 9 Am. B. R. 643, 645; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[22] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567.

[23] Official Form No. 42; see Form No. 72, *post*.

[24] Official Form No. 43; see Form No. 73, *post*.

[25] Official Form No. 44; see Form No. 77, *post*.

[26] Official Form No. 45; see Form No. 83, *post*.

[27] Official Form No. 46; see Form No. 84, *post*.

[28] B. A. 1898, Sec. 58*a*. But see *In re* Hawkins, 125 Fed. Rep. 633, 11 Am. B. R. 49.

[29] Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; *In re* Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 10 Am. B. R. 236.

[30] *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

into the possession of the trustee unencumbered by mortgage or lien, may be sold by the trustee under the direction of the court.[1] The trustee may be authorized to compromise or sell and assign, in such manner as the judge or referee may order, any outstanding claims or other property in his hands due or belonging to the estate, which can not be collected or received by him without unreasonable or inconvenient delay or expense.[2]

The trustee may apply to the referee for permission to sell such property by auction or at private sale.[3] In the case of real estate, it may be sold in lots or parcels or as a whole, as the referee may direct.

The application for leave to sell property is made by petition.[4] The petition should be entitled in the court and cause and allege that it would be for the benefit of the estate that certain property, describing it and its estimated value, should be sold by auction or at private sale, as may be desired. In case it is desired to have it sold at private sale, the reasons or advantages to be obtained by selling at private sale should be set forth in the petition. The property to be sold, either at auction or at private sale, should be specifically described. The petition should conclude with a prayer that the trustee may be authorized to make the sale by auction or at private sale, as may be. The petition is dated and signed by the trustee without verification.

The referee, as soon as the petition is filed, should give ten days' notice by mail to the creditors of the bankrupt of the hearing on such petition.[5] At the time and place mentioned in the notice a hearing is had, at which evidence may be introduced and counsel heard in favor of the petition and in

[1] *In re* Goldsmith, 9 Am. B. R. 419, 118 Fed. Rep. 763; *In re* Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96.

[2] B. A. 1898, Sec. 27; Gen. Ord. 28. Compare R. S. Secs. 5061 and 5064.

[3] As to private sales, see *In re* Kirtland, No. 7851 Fed. Cas., 10 Blatch. 515; *In re* Stevenson, 6 Fed. Rep. 710.

[4] Official Forms Nos. 42 and 45; see Forms Nos. 72 and 83, *post.*

[5] B. A. 1898, Sec. 58*a*.

opposition thereto; on consideration whereof the referee may pass an order that the trustee be authorized to sell the property as prayed in the petition, or may refuse to grant such leave as in his judgment is most advantageous to the estate. If leave for sale is given, the referee should require the trustee to keep an accurate account of each article or lot sold, and the price therefor and to whom sold, and that an account thereof shall be filed at once with the referee.

§ 256. Encumbered property.

Where property of the bankrupt is in the possession of a mortgagee, pledgee, or other lienor, the trustee can not sell it without the consent of the secured creditor. The reason is that a court of bankruptcy has no power to bring in such person as a party to the bankruptcy proceedings or an independent suit, unless the property is in *custodia legis*.[1] The court of bankruptcy, however, may sell the property with his consent. It is sometimes convenient and to the advantage of the secured creditor and the estate to have such property administered by the trustee. The secured creditor may voluntarily appear in the bankruptcy proceedings. Proving his claim as a secured creditor makes him a party to the proceedings in bankruptcy and subjects him to the order of the court. But unless the court gets jurisdiction of the person or the property, the trustee can not sell it.

Where the property of the bankrupt in the possession of the trustee or otherwise in *custodia legis* is burdened with mortgages, liens, and encumbrances, several courses are open, namely: *First*, the trustee may elect not to take such property. *Second*, he may redeem the property by discharging the encumbrances. *Third*, he may sell the bankrupt's interest without affecting the rights of secured creditors in the property. *Fourth*, he may sell the property free from all liens whatsoever. These courses are considered more at length in the next few sections.

[1] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

§ 256a. First: Where the trustee elects not to take encumbered property.

Where property comes into the possession of the trustee so burdened with mortgages, liens and encumbrances that the bankrupt's equity of redemption in that property is without value, he may elect not to take it.[1] A court of bankruptcy will not ordinarily order a sale on a petition by the trustee, where the encumbrances equal the value of the property.[2] It is, however, a question of discretion. The court may order the property turned over to the secured creditor or direct it to be sold by the trustee.[3]

§ 256b. Second: Where the trustee redeems the property by discharging encumberances.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which must be given

[1] See Trustee not bound to take encumbered interest, Sec. 151, *ante*, and cases cited in the notes.

[2] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

[3] Equitable Loan & Security Co. v. Moss & Co. (C. C. A. 5th Cir.), 125 Fed. Rep. 609, 11 Am. B. R. 111; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767.

In re Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117, the court said: "It is not, therefore, a matter of power, but of discretion; and while, ordinarily, the latter will not be exercised in favor of a sale where the incumbrances equal the value of the property, yet there are considerations in the present instance which seem to make it advisable."

as the court shall direct, so that all creditors and other persons interested may appear and show cause if any they have, why an order should not be passed by the court upon the petition, authorizing such act on the part of the trustee.[1]

The value of securities held by secured creditors is determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct.[2]

The application for redemption of property from a lien is made by petition, which should be in the form prescribed.[3] The petition should be entitled in the court and cause. It should represent that certain portions of the bankrupt's estate, describing the property and its estimated value, is subject to a mortgage or other lien, setting forth or describing the mortgage or lien; and contain an allegation that it is for the benefit of the estate that such property should be redeemed and discharged of the lien. The petition concludes with a prayer that the trustee may be empowered to pay out of the assets of the estate in his hands the amount of the lien in order to redeem the property. The petition is dated and signed by the trustee, bankrupt, or creditor,[4] without verification.

The petition is regularly presented to the referee, who is required to give ten days' notice of the date of the hearing to the creditors of the bankrupt.[5] At the hearing, evidence may be introduced and counsel heard in favor of the petition and in opposition thereto. In consideration whereof, the referee may authorize the trustee to make such payment and redeem the property. If it appears to the referee that it is not for the advantage of the estate to redeem such property he may decline to grant the request to redeem the property.

[1] Gen. Ord. 28.

[2] B. A. 1898, Sec. 57*h*.

[3] Official Form No. 43; see Form No. 73, *post*; Gen. Ord. 28.

[4] Gen. Ord. 28.

[5] B. A. 1898, Sec. 58*a*; *In re* Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96.

§ 256c. Third: Where the trustee sells subject to liens.

The trustee may be authorized by the judge or referee[1] to sell the interest of the bankrupt in any encumbered property in his possession as part of the estate without affecting the rights of the secured creditor to enforce his lien against the property.[2] In this respect the trustee acts only in the interests of the general creditors. It is no part of his duty to make such an application unless he believes the sale will create a larger fund for distribution among the unsecured creditors. He should not make an application for the sale of property which has no market value, or one that is clearly less than the debt secured by the lien.[3]

An application for the sale of such property, subject to a lien, is made by petition, which should be in the prescribed form.[4] The petition should be entitled in the court and cause. It should describe the estate, or property to be sold, and its estimated value. It should set forth or describe the mortgage or other lien upon the property. It should contain an allegation that the sale would be for the benefit of the estate and that the property should be sold. It should conclude with a prayer that he may be authorized to make the sale of such property subject to the encumbrances thereon. The petition should be signed by the trustee, but need not be verified. The petition is presented to the referee.[4]

The referee should give ten days' notice of the date of the hearing of the petition for such sale by mail to the creditors

[1] *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366 *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459.

[2] *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459; Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; *In re* Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 10 Am. B. R. 236.

[3] *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

[4] Official Form No. 44, see Form No. 77, *post*; *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366.

of the bankrupt.[5] A hearing is had at the time and place named in the notice, at which arguments may be heard in favor and in opposition to the petition and evidence introduced. Upon consideration of which the referee may order the property sold at auction or at private sale, and require the trustee to keep an accurate account of the property sold, the price given therefor, to whom sold, and file the account thereof at once with the referee. If it appears to the referee that nothing is to be gained by the sale he may refuse to grant the prayer of the petition.

§ 256d. Fourth: The trustee may sell property free of all liens.

The trustee may also apply for leave to sell encumbered property free from all encumbrances.[1] He may sell it free of a wife's inchoate right of dower with her consent.[2]

The application for such a sale is made by a petition substantially like that prescribed in form No. 44 for a sale sub-

[5] B. A. 1898, Sec. 58*a*.

[1] *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 967; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685; *In re* Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 9 Am. B. R. 643; *In re* Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

[2] In Savage v. Savage (C. C. A. 4th Cir.), 141 Fed. Rep. 346, 15 Am. B. R. 599, the court said: "It is nearly always desirable, in making sale of a bankrupt's real estate, if the wife will consent, to sell free from her inchoate right of dower, and to compensate her by a fair allowance out of the proceeds for her release of that right. It is common practice to do so when it is possible, and we think the practice is to be approved, as it gives the purchaser an unincumbered title, and ordinarily results in advantage to creditors by obtaining a better price for a clear title than can be obtained for property the title to which is clouded by such a possible incumbrance." See also *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

ject to encumbrances, except that the prayer should be that he may be authorized to sell such property free from all encumbrances. The application is regularly made to the referee for leave to sell free of liens.[3] A ten days' notice should be given the general creditors.[4] The rights of the secured creditors being affected by the sale, they must likewise have notice to appear and protect their interests.[5] The notice prescribed by Sec. 58*a* of the bankrupt act is sufficient to bring in secured creditors.[6] This notice may be served personally on the creditor and proof of such service made by affidavit. The record must show affirmatively that every creditor whose lien will be discharged by the sale has received notice of the application to sell.[7] A general statement by the referee that such notice "was given to each and every creditor and lien creditor" is not sufficient.[7]

The trustee may be directed to sell such property at public auction or at private sale. When the sale is made, the lien is transferred to the fund in court.[8] The bankruptcy court hav-

[3] *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 366; *In re* Matthews, 109 Fed. Rep. 603, 6 Am. B. R. 96; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Rosenberg, 116 Fed. Rep. 402, 8 Am. B. R. 624.

[4] B. A. 1898, Sec. 58*a*.

[5] *In re* Platteville Foundry & Machine Co., 147 Fed. Rep. 828; *In re* Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; Ray v. Norseworthy, 23 Wall. 128, 23 L. Ed. 116; Houston v. City Bank, 6 How. 486, 12 L. Ed. 526; Fowler v. Hart, 13 How. 373, 14 L. Ed. 186.

[6] *In re* Granite State Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Wilka, 131 Fed. Rep. 1004, 12 Am. B. R. 727.

[7] *In re* Saxton Furnace Co., 136 Fed. Rep. 697, 14 Am. B. R. 483.

[8] *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *In re* Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514, 3 Am. B. R. 9; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; Carroll & Bros. Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 9 Am. B. R. 643.

In First National Bank v. Trust Co., 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "The sale in the circumstances did not change the situation. The proceeds stood in place of the property and the order returning the proceeds was equivalent to an order returning the property.

ing sold the property free from liens and the liens having attached to the funds in the court's custody, the bankruptcy court will decide the rights of the different lien claimants,[9] and may call the claimants in by either notice or rule to show cause.[10] After deducting the expenses of the sale,[11] the mortgages and other liens must be paid out of the fund obtained from the sale before it is applied to the payment of other debts, even the debts which are given priority by the statute.[12]

It is not necessary for the lien claimant to prove his claims before he can subject the property or its proceeds to his debt,[13] nor is it necessary for him in any way to object to the sale, if his proportional share of the proceeds can be determined.[14] Where the entire property is sold without any objection from

This was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits."

[9] Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re* Byrne, 97 Fed. Rep. 762, 3 Am. B. R. 268.

In re Rochford (C C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608, the court said: "The only question here presented is whether or not the referee and the court had jurisdiction to determine the validity of the claim of the mortgagee to the property or its proceeds. The sale was valid. The court lawfully acquired and rightfully held the custody of the property. The conversion of it into money by the sale was a rightful proceeding in bankruptcy. The issue of the notice to the mortgagee to present his claim to the court and the adjudication of it were far within the jurisdiction of the referee and of the court below."

[10] *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608.

[11] McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; affirming *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383.

[12] *In re* Prince and Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re* Frick, 1 Am. B. R. 719; *In re* McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387; but see *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; see also *post,* Sec. 267, last paragraph.

[13] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Oconee Milling Co. (C. C. A. 5th Cir.), 109 Fed. Rep. 866, 6 Am. B. R. 475.

[14] Carroll Co. v. Young (C. C. A. 3d Cir.), 119 Fed. Rep. 576, 9 Am. B. R. 643. See also Keyser v. Wessel (C. C. A. 3d Cir.), 128 Fed. Rep. 281, 12 Am. B R. 126.

a creditor who has a lien on a portion of it, he can not enforce his lien against the proceeds; he should make his claim before the sale and have the goods on which he has a lien sold separately.[15] The purchaser should be protected from being forced to pay taxes which though not yet levied have become a lien at the time of the sale.[16] Where the lien claimant is the purchaser, if the amount and validity of his lien is unquestioned, he should be allowed to deduct it from the purchase price; if the lien is doubtful he should pay the difference between the amount of the lien as claimed and the purchase and give the trustee an undertaking to pay the balance if it is decided against him.[17]

Where a secured creditor has received money on his claim by order of the referee, he is entitled to retain it until the order is vacated by a direct proceeding for that purpose.[18]

§ 257. When a secured creditor may apply to have property, on which he has a lien, sold.

The trustee may not see fit to institute proceedings for the sale of encumbered property. Whenever he does not, the secured creditor must do so, if it is to be sold in the court of bankruptcy.

Since all the property of the bankrupt passes to the trustee, as has been pointed out elsewhere,[1] subject to equities, property on which there is a mortgage or other lien passes to the trustee, and is therefore in the custody of the court of bankruptcy.[2] This rule is subject to an exception in case the

[15] *In re* Klapholz, 113 Fed. Rep. 1002, 7 Am. B. R. 703; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459; Keyser v. Wessel (C. C. A. 3d Cir.), 128 Fed. Rep. 281, 12 Am. B. R. 126.

[16] *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351.

[17] *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427.

[18] *In re* Wilkesbarre Furniture Mfg. Co., 130 Fed. Rep. 796, 12 Am. B. R. 472.

[1] See Title to bankrupt's property, Sec. 149, *ante*.

[2] *In re* Kellogg (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 10 Am. B. R. 7; *In re* Rochford (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 10 Am. B. R. 608; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 9 Am. B. R. 444; *In re*

trustee elects not to take encumbered property. In case the trustee elects not to take the encumbered property, it releases the jurisdiction of the bankruptcy court over such property, and the secured creditor may proceed to enforce his lien in a state court.

An attempt to enforce a lien in any other court is liable to be enjoined.[3] A sale so made may be set aside.[4] The court of bankruptcy may permit or authorize a secured creditor to enforce his security in a state court.[5] In such case the trustee must be a party to the proceeding.[6] Such a proceeding in a state court, without authority, is not absolutely void.[7] The court of bankruptcy will not interfere with such proceedings unless an advantage may result to the bankrupt estate.[8] It may ratify the state proceedings upon application where the secured creditor shows that the estate and the

Kellogg, 6 Am. B. R. 389; Carter v. Hobbs 92 Fed. Rep. 594, 1 Am. B. R. 215; *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *In re* Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Booth, 96 Fed. Rep. 943, 2 Am. B. R. 770.

[3] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5 Am. B. R. 383; *In re* Matthews, 109 Fed. Rep. 603 6 Am. B. R. 96; *In re* Pittelkow, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re* Globe Cycle Works (Ref.), 2 Am. B. R. 447; Markson v. Heaney, No. 9098 Fed. Cas., 1 Dill. 497; McLean v. Lafayette Bank, No. 8885 Fed. Cas., 3 McLean, 185; *In re* Kerosene Oil Co., No. 7725 Fed. Cas., 3 Ben. 35; *In re* Wynne, No. 18117 Fed. Cas., Chase, 227.

See Clifton v. Foster, 103 Mass. 233.

[4] *In re* Davis, No. 3618 Fed. Cas., 2 N. B. R. 391; Davis v. Anderson, No. 3623 Fed. Cas., 6 N. B. R. 143.

[5] *In re* Porter, 109 Fed. Rep. 111, 6 Am. B. R. 259; Equitable Loan & Security Co. v. Moss & Co., 125 Fed. Rep. 609, 11 Am. B. R. 111; *In re* Cook, No. 3151 Fed. Cas., 3 Biss. 116; *In re* McGilton, No. 8798 Fed. Cas., 3 Biss. 144.

[6] Cole v. Duncan, 58 Ill. 176; Truitt v. Truitt, 38 Ind. 16; Winslow v. Clark, 47 N. Y. 261; Barron v. Newberry, No. 1056 Fed. Cas., 1 Biss. 149.

[7] Whitridge v. Taylor, 66 N. C. 273; Truitt v. Truitt, 38 Ind. 16; Pierce v. Wilcox, 40 Ind. 70; Cole v. Duncan, 58 Ill. 176; Mays v. Fritton, 20 Wall. 414, 22 L. Ed. 389; Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729; Boese v. King, 108 U. S. 379, 27 L. Ed. 760.

[8] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Holloway, 93 Fed. Rep. 638, 1 Am. B. R. 659; *In re* Brinkman, No. 1883 Fed. Cas., 6 N. B. R. 541; *In re* Bowie, No. 1728 Fed. Cas., 1 N. B. R. 628; *In re*

other creditors will not be injured thereby.[9] The secured creditor may surrender his security or rely upon his security without proving his claim,[10] or if the entire debt is not secured, he may rely upon his security and prove for the balance.[11]

Whenever a secured creditor desires to enforce his mortgage or other lien in a court of bankruptcy, he may file an intervening petition asking that the trustee administer the property in the bankruptcy proceedings. This petition should be filed by leave of court. It is not necessary for him to first prove his claim.[12] If he does not prove his claim, he is not entitled to a dividend on any part of the debt not covered by the security. He can not demand as a matter of right that the court of bankruptcy enforce his security. It is purely a matter of judicial discretion. If it appears that the encumbrance is equal to the value of the property, the court will not, ordinarily, undertake to enforce the security.[13] It is, however, sometimes convenient in the settlement of an estate to have such property sold by the trustee. In case it appears, for any reason, to be for the best interests of the general creditors, the court may order property encumbered to its full value to be sold by the trustee.[14]

A secured creditor may obtain a sale of property securing

Iron Mountain Co., No. 7065 Fed. Cas., 9 Blatch. 320; Tichenor v. Allen, 13 Grat. (Va.) 15.

[9] Phelps v. Sellick, No. 11079 Fed. Cas., 6 N. B. R. 390.

[10] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

[11] See Rights of secured creditors, Sec. 202, *ante*; B. A. 1898, Sec. 56*b* and Sec. 57*h*; Wicks v. Perkins, No. 17615 Fed. Cas., 1 Woods, 383; Brown v. Gibbons, 37 Ia. 654; McKay v. Funk, 37 Ia. 661; Bentley v. Wells, 61 Ill. 59.

[12] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

[13] *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re* Shaeffer, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Gibbs, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

[14] *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Union Trust Co., 122 Fed. Rep. 937, 9 Am. B. R. 767.

his debt in a court of bankruptcy by first proving his claim in the manner prescribed.[15] In such case he is entitled to a dividend on such sum as may be owing over and above the value of his security.[16] Either his security or his debt may be disputed. The contest is made upon the proof of the debt in the same manner as contests upon the proof of unsecured debts.[17] If his claim is allowed, the property will regularly be sold upon application. The object of selling such property is to ascertain the value of the security.

It is not always necessary to resort to a sale for this purpose. The value of a security held by a secured creditor may be determined by converting the same into money according to the terms of the agreement pursuant to which such security was delivered to such creditor, by such creditor, and the trustee, by agreement, arbitration or compromise, as well as by litigation.[18] Whichever method is resorted to for this purpose is subject to the direction of the court.[18] The selling of such property is a matter of judicial discretion. The court will take a course which, in its judgment, having due reference to the rights of the secured creditors, will be most beneficial to all the parties interested. A secured creditor can not demand, as a matter of right, that the trustee shall, upon his offer, convey the property, upon which he has a lien, to him on condition of his agreeing not to present a claim for any part of the debt against the estate.[19]

Where a secured creditor seeks and enjoys the aid of the bankruptcy court in enforcing and releasing his liens, he should pay the costs incurred in obtaining this aid.[20] The

[15] Official Forms No. 32 and No. 36; see Forms Nos. 55 and 59, *post*.

[16] B. A. 1898, Sec. 57*e*.

[17] See Re-examination of claims, Sec. 140, *ante*.

[18] B. A. 1898, Sec. 57*h*.

[19] *In re* Ellerhorst, No. 4380 Fed. Cas., 2 Saw. 219.

[20] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 734, 5 Am. B. R. 383; *In re* Alison Rubber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

referee and trustee are entitled to commissions on all moneys dispersed to a secured creditor by the trustee.[21]

§ 258. Disputed property.

It would seem that, under the general power conferred upon the court of bankruptcy with reference to collecting, reducing to money and distributing the estates of bankrupts, and determining controversies in relation thereto,[1] that the court may order property, which is in dispute, sold. The title to a part of the real or personal property which comes into possession of the trustee or which is claimed by him may be in dispute. It may be for the advantage of all concerned that such property be sold, and the fund deposited in court until the court of bankruptcy shall determine to whom it belongs.

Where the property is in the possession of the trustee, or the claimant is a party to the bankruptcy proceedings, he may sell it under the direction of the court without the consent of the claimant, but where the property is in the possession of the claimant he must procure his consent or resort to a suit in a court of competent jurisdiction to recover it.[2]

In case the property is in his possession the trustee should petition the judge or referee for leave to make such sale. Ten days' notice should be given to the creditors.[3] Notice should also be given to the claimant to appear and assert his right in the property. In practice, sales of this character can usually be arranged by agreement.

§ 259. Sale of perishable property.

Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate

[21] B. A. 1898, Secs. 40 and 48 as amended by the act of February 5, 1903, 32 Stat. at L. 797; *In re* Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414; *In re* Iowa Falls Mfg. Co., 140 Fed. Rep. 527, 15 Am. B. R. 384.

[1] B. A. 1898, Sec. 2, clause 7.

[2] *In re* Rosenberg, 116 Fed. Rep. 492, 8 Am. B. R. 624; *In re* First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685.

[3] B. A. 1898, Sec. 58*a*.

is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.[1] The petition and order should be in the prescribed form.[2]

§ 260. The sale.

All sales must be by public auction unless otherwise ordered by the court.[1] Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale, in which case he must keep an accurate account of each article sold, and the price received therefor, and to whom sold, which account he must file at once with the referee.[2]

There is no provision of the bankrupt act or general orders requiring a sale to be advertised in a newspaper. Congress has provided by special act the manner in which property shall be sold under an order, judgment or decree of any United States court.[3] It provides for a public sale at the

[1] Gen. Ord. 18, par. 3. See also *In re* Becker, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re* Edes, 135 Fed. Rep. 595, 14 Am. B. R. 382; *In re* Le Vay, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re* Joyce, 128 Fed. Rep. 985, 11 Am. B. R. 716.

[2] Official Form No. 46; see Form No. 84, *post*.

[1] Gen. Ord. 18.

[2] Gen. Ord. 18, par. 2; Official Form No. 45, see Form No. 83, *post; In re* Hawkins, 125 Fed. Rep. 633, 11 Am. B. R. 49; *In re* Gutterson, 136 Fed. Rep. 698, 14 Am. B. R. 495; *In re* Edes, 135 Fed. Rep. 595, 14 Am. B. R. 382.

[3] The act of March 3, 1893, 27 Stat. at L. 751, provides:

"Sec. 1. That all real estate or any interest in land sold under any order or decree of any United States court shall be sold at public sale at the Court-house of the county, parish, or city in which the property, or the greater part thereof, is located, or upon the premises, as the court rendering such order or decree of sale may direct.

"Sec 2. That all personal property sold under any order or decree of any court of the United States shall be sold as provided in the first section of this act, unless in the opinion of the court rendering such order or decree, it would be best to sell it in some other manner.

"Sec. 3. That hereafter no sale of real estate under any order,

courthouse or upon the premises and for publication of notice of the sale of real estate in a county newspaper once a week for at least four weeks prior to the sale.[4] It has been held that the act of 1893 does not apply to sales in bankruptcy proceedings.[5] The act of 1893 by express terms applies to all United States courts, which clearly includes courts of bankruptcy. It is not expressly repealed or modified in any respect by the bankrupt act. The omission in that act to regulate in any way the manner of making a sale in bankruptcy proceedings shows that Congress, having by special act made all necessary provisions for such sale, did not see fit to further legislate on the subject. The act of 1893 has been held to be directory and not mandatory and that if it is not followed and no objection is made to the irregularity until after confirmation, the sale is valid and the purchaser's title good.[6] Whether it is binding on courts of bankruptcy or not, it is safe and proper for a court of bankruptcy to conform to this statute by ordering a sale in bankruptcy. By Section 2 of the act of 1893, the judge may order personal property sold in some other manner when it seems best to him to do so. The advertisement relates only to real estate.

judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered, and had once a week, for at least four weeks, prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be. If said property shall be situated in more than one county or state, such notice shall be published in such of the counties where said property is situated, as the court may direct. Said notice shall, among other things, describe the real estate to be sold. The court may, in its discretion, direct the publication of the notice of sale herein provided for to be made in such other papers as may seem proper."

[4] Twenty-seven days is not sufficient. Wilson v. Northwestern Mutual Life Insurance Co. (C. C. A. 8th Cir.), 65 Fed. Rep. 38.

[5] *In re* Edes, 135 Fed. Rep. 595, 14 Am. B. R. 382.

[6] National Nickel Co. v. Nevada Nickel Syndicate (C. C. A. 9th Cir.), 112 Fed. Rep. 44, 50 C. C. A. 113, in court below, 106 Fed. Rep. 110, 103 Fed. Rep. 390; Black v. Black, 77 Fed. Rep. 785; Godchaux v. Morris (C. C. A. 5th Cir.), 121 Fed. Rep. 482.

Before the date of sale of real or personal property belonging to the bankrupt's estate it must be appraised by three disinterested appraisers.[7] The appraisers are appointed by and report to the judge or referee,[8] usually the referee. Where the trustee is acting under an order of sale, he should proceed in accordance with the provision of the order. Anything which he may do in conflict with or in violation of such order is null and void. Under an order to sell for the highest price he can obtain, he must accept the highest bid, although he has previously agreed to sell to another person for a certain price, and to wait for an answer for a certain time, which period has not expired at the time of receiving the better bid.[9] A sale is regularly made by the trustee, but the court may appoint commissioners to make it.[10] The court may appoint an official auctioneer.[11]

As a general rule, any person may bid and purchase at a public or private sale by a trustee. The bankrupt may purchase at such a sale.[12] The trustee,[13] or an attorney or agent of the trustee,[14] or a referee,[15] can not purchase at such a sale; but if the trustee, having purchased, makes improvements he is entitled to be reimbursed their value.[16]

Holders of the bonds of a bankrupt corporation, secured by a mortgage, which gives them the right to use such bonds in the purchase of the property if sold at judicial sale, should not be deprived of such right by an order authorizing the trustee to sell the property free from liens, so long as their

[7] B. A. 1898, Sec. 70*b*.

[8] B. A. 1898, Sec. 70*b*; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

[9] *In re* Ryan, No. 12182 Fed. Cas., s. c. 6 N. B. R. 235; Sturgiss v. Corbin (C. C. A. 4th Cir), 141 Fed. Rep. 1 ,15 Am. B. R. 543.

[10] Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 15 Am. B. R. 543.

[11] *In re* Benjamin, 136 Fed. Rep. 175, 14 Am. B. R. 481.

[12] Arnold v. Leonard, 20 Miss. 258.

[13] *In re* Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

[14] Citizens Bank v. Ober, No. 2731 Fed. Cas., s. c. 1 Woods, 80.

[15] B. A. 1898, Sec. 39*b*.

[16] *In re* Hawley, 117 Fed. Rep. 364, 9 Am. B. R. 61.

title to the bonds is unimpeached.[17] The trustee need not adjourn a sale for the purpose of giving a bidder time to search the title.[18] Where a sale is fairly made, and the bids are understood by the bystanders and the auctioneer, it will be a valid sale, although the trustee is present, but, in consequence of his negligence and inattention, fails to understand the terms thereof. Such a purchaser can compel a transfer of property to him by the trustee.[19] The purchaser is also bound by the terms of the sale.[20]

It is not absolutely necessary that a sale be confirmed by the court, but all real and personal property must, when practicable, be sold subject to the approval of the court.[21] It can not be sold otherwise than subject to the approval of the court for less than seventy-five *per centum* of its appraised value.[22]

Where the sale has been confirmed by the court the title to the property is conveyed to the purchaser by the trustee.[23] Where the property is sold free of liens the purchaser is entitled to a deed to the property released and discharged of all incumbrances whatsoever, including taxes.[24] Where it is sold subject to liens only the title to the bankrupt's interest is transferred, the title of third persons claiming adversely is

[17] *In re* Saxton Furnace Co., 136 Fed. Rep. 697, 14 Am. B. R. 483.

[18] Hills v. Alden, No. 6507 Fed. Cas., s. c. 2 Hask. 299.

[19] Ives v. Tregent, 29 Mich. 390; Russell v. Phelps, 42 Mich. 388; Voorheis v. Frisbie, 25 Mich. 476, and note 1 (annotated ed.). See also as to right of purchase at sale, Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 15 Am. B. R. 543.

[20] Owens v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 72, 6 Am. B. R. 322.

[21] B. A. 1898, Sec. 70*b*; *In re* Shea (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 11 Am. B. R. 207, the court said: "We do not undertake to say that Sec. 70*b* requires always a formal approval. If a sale is made and silently acquiesced in for a considerable time, or if the proceeds thereof are credited in the trustee's account, and the account is passed, either may be held to meet the requirements of the statute."

[22] B. A. 1898, Sec. 70*b*.

[23] B. A. 1898, Sec. 70*c*.

[24] *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351; *In re* Prince v. Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

in no way affected.[25] The conveyance of real estate is made by deed, which should recite the bankruptcy proceedings, the appointment and qualification of the trustee and the proceedings relating to the sale and the confirmation by the court and is executed by the trustee as other deeds in the state where the property is situated.[26]

A court of bankruptcy has no power to restrain the trustee from making a deed to the purchaser or to compel a specific performance of an alleged contract between the petitioner and the purchaser relating to a division of the land sold.[27] A controversy between third persons is not a part of the bankruptcy proceeding.

§ 261. Setting aside a sale.

The contest, with reference to the validity of the sale, is usually made at the time of the application to the court to confirm the sale. The court will not refuse to confirm a sale or set it aside after it has been confirmed merely because a higher bid is offered,[1] or because the price is inadequate;[2] there must be circumstances impeaching the validity of the sale or such gross inadequacy as to shock the conscience.[3]

The court of bankruptcy has power, in its discretion, to set aside a sale even where such sale has been consummated by the delivery of a deed.[4] In case money has been deposited or paid, it should be ordered to be refunded by the trustee.

[25] *In re* Muhlhauser (C. C. A. 6th Cir.), 121 Fed. Rep. 669, 10 Am. B. R. 236; Cramer v. Wilson, 195 U. S. 409, 49 L. Ed. 256.

[26] For form of deed to real estate, see No. 165, *post*.

[27] Henrie v. Henderson (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 16 Am. B. R. 617.

[1] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679; Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 15 Am. B. R. 543.

[2] *In re* Thompson, 2 Am. B. R. 216.

[3] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; Magann v. Segal (C. C. A. 6th Cir.), 92 Fed. Rep. 252, 34 C. C. A. 323.

[4] *In re* Mott, No. 9878 Red. Cas *In re* Stevenson, 6 Fed. Rep. 710; *In re* Hyde, 6 Fed. Rep. 587; *Ex parte* Bryan, No. 2061 Fed. Cas., 2 Hughes, 273.

Thus a sale may be set aside on the ground of fraud or collusion,[5] or because the sale is illegal, as in not selling to the highest bidder,[6] or selling property unlawfully in the possession of the trustee,[7] or made under an illegal or irregular order,[8] or any misconduct on the part of the trustee,[9] and this may be done although the purchaser is entirely innocent and although the sale was not made subject to the order of the court.[10] In deciding whether or not a sale shall be set aside the court will give much weight to objection on the part of the creditors.[11]

Under the present statute if a sale is made for less than seventy-five *per centum* of the appraised value it would seem to be sufficient ground for setting aside the sale, irrespective of whether any fraud or collusion was shown, provided it was made otherwise than subject to the approval of the court.[12] The mere nondelivery of a deed by the trustee is not sufficient cause for setting aside a sale, otherwise regular, and ordering a resale.[13]

A sale made by an assignee for the benefit of creditors may be set aside and suit brought by trustee to recover property fraudulently conveyed which was used in purchasing at assignee's sale.[14]

[5] *In re* Ethier, 118 Fed. Rep. 107, 9 Am. B. R. 160; *In re* Conant, No. 3085 Fed. Cas., cited *In re* King, 3 Fed. Rep. 842; *In re* Hyde, 6 Fed. Rep. 592; Clark v. Clark, 17 How 315, 15 L. Ed. 77; *In re* Stevenson, 6 Fed. Rep. 710.

But see Hills v. Alden, No. 6507 Fed. Cas., 2 Hasck. 299, as to what is not evidence of fraud.

[6] *In re* Ryan, No. 12182 Fed. Cas. 6 N. B. R. 235.

[7] Davis v. R. R. Co., No. 3648 Fed. Cas., 1 Woods, 661.

[8] *Ex parte* Bryan, No. 2061 Fed. Cas., 2 Hughes, 273; *In re* Mott, No. 8978 Fed. Cas.

[9] *In re* Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481; petition for review dismissed (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 11 Am. B. R. 207; *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679.

[10] *In re* Shea, 122 Fed. Rep. 742, 10 Am. B. R. 481. Petition for review dismissed (C. C. A. 1st Cir.), 126 Fed. Rep. 153, 11 Am. B. R. 207.

[11] *In re* Belden, 120 Fed. Rep. 524, 9 Am. B. R. 679.

[12] B. A. 1898, Sec. 70*b*.

[13] *In re* King, 3 Fed. Rep. 839. See also Owens v. Bruce (C. C. A. 4th Cir.), 109 Fed. Rep. 72, 6 Am. B. R. 322.

[14] *In re* Finlay Bros., 104 Fed Rep., 675, 4 Am. B. R. 745.

§ 262. Costs of sale.

The expenses of a sale are ordinarily legitimate costs of administration, and should be paid first, out of the proceeds of the property sold.[1] Such costs are left by statute in the discretion of the court,[2] and questions arising in relation to them must be disposed of upon equitable principles.

Where a mortgage is apparently fraudulent, and creditors have endeavored to have it declared void, such creditors are entitled to be reimbursed the amount of their reasonable costs, expenses and disbursements in the proceedings in bankruptcy, including the sale of the mortgaged property, from the proceeds of such sale.[3] Where a secured creditor seeks and enjoys the aid of the bankruptcy court in enforcing and releasing his lien, he should pay the costs incurred in obtaining this aid.[4] But with regard to the costs of general administration, in which he has no concern, and in which he can have no interest until his lien is either satisfied or released, it would be inequitable to require him to bear the burden of them.[5]

[1] *In re* Sanderlin, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638.

[2] B. A. 1898, Sec. 2, clause 18.

[3] *In re* Dumont, 4127 Fed. Cas., 4 N. B. R. 17.

[4] *In re* Utt (C. C. A. 7th Cir), 105 Fed. Rep. 754, 5 Am B. R. 383; *In re* Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Goldsmith, 118 Fed Rep. 763, 9 Am. B. R. 419.

[5] *In re* Hambright, No. 5973 Fed. Cas., 2 N. B. R. 498; *In re* Davenport, No. 3587 Fed. Cas., 3 N. B. R. 77; *In re* York, No. 18138 Fed. Cas., 3 N. B. R. 661.

In re Alison Lumber Co., 137 Fed. Rep. 643, 648, 14 Am. B. R. 78, 84 After referring to costs incurred in the state court, Judge Speer said: "The expenses and costs of the bankruptcy court stand upon a superior footing, and, if there is not sufficient money arising from the sale of unpledged property to pay them, it seems that the secured creditors should contribute ratably to that purpose. They have appeared in the bankruptcy court, selected it as their forum, availed themselves of the services of its officers, and utilized its process to collect their claims. We have no doubt of their duty to contribute to pay all such costs and expenses."

Creditors who have failed to obtain a review of an order directing a private sale of the bankrupt's property may be required to pay the incidental expenses attending the sale.[6]

§ 263. Of preferences and debts.

The trustee may receive, as a part of the bankrupt's estate, property which has been transferred by the bankrupt prior to the filing of the petition in fraud of the act. The transferee may decline to reconvey it. He may also receive as a part of the estate debts and accounts due the bankrupt which the debtors refuse to pay.

The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate,[1] or he may submit the claim to arbitration.[2] Whenever it may be deemed for the benefit of the estate of a bankrupt to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proven his debt, may file his petition therefor; and thereupon the court appoints a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.[3] The creditors are entitled to ten days' notice by mail of the proposed compromise of any controversy.[4]

It may, however, be necessary for the trustee to resort to a suit to recover the preferred property or to compel the pay-

[6] *In re* Johnston, No. 7424 Fed. Cas., 25 Pitts. Leg. J. 141.

[1] B .A. 1898, Sec. 27. Compare R. S. Sec. 5061 Consult *In re* Dibblee, No. 3885 Fed. Cas., 3 Ben. 354; *In re* Graves, No. 5709 Fed. Cas., 2 Ben. 100; *In re* Hoole, 3 Fed. Rep. 496; Estate of the Franklin Sav. Fund Soc., No. 5058 Fed. Cas., 31 Leg. Int. 173

[2] B. A. 1898, Sec. 26; Gen. Ord 33.

[3] Gen. Ords. 28 and 33; *In re* Hoole, 3 Fed. Rep. 496.

[4] B. A. 1898, Sec. 58*a*.

ment of such debts. The authority of the trustee to bring and prosecute such suits can not be questioned.[5]

The trustee was compelled at first to prosecute such suits in a state court, except upon consent of the defendant.[6] Since the amendment of February 5, 1903, he may prosecute such suits either in the courts of bankruptcy or a state court.[7]

[5] B. A. 1898, Sec. 60*c*, Sec. 67*e* and Sec. 70*e* and Sec. 47, clause 2. As to the nature of such suits, see Sec. 203*a*, *ante*.

[6] For a discussion of this subject, see Sec. 20.

[7] B. A. 1898, Secs. 23, 60, 67 and 70, as amended Feb. 5, 1903, 32 Stat. at L. 797; Pond v. N. Y. Exchange Bank, 124 Fed. Rep. 992, 10 Am. B. R. 343. See Sec. 203, *ante*.

CHAPTER XXV.

THE DISTRIBUTION OF THE ESTATE.

§ 264. The general plan of distribution.

The trustee collects and reduces to money the property of the estate, for which he is trustee, under the direction of the court, and is required to account for and pay over to such estate all interest received by him upon the property of the estate.[1] The money so collected is deposited in one of the designated depositories. This constitutes the fund to be distributed. It should be deposited in the name of the court or judge[2] or to the credit of the trustee, naming the estate,[3] and should not be withdrawn on check signed by the referee only, but only when such check is countersigned by the judge or some one designated by him.[4]

The trustee is required to report to the court, the judge or referee, in writing, the condition of the estate and the amounts of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court.[5] All accounts of the trustee are referred, as of course, to the referee for orders, unless otherwise specially ordered by the court.[6]

The referee keeps a record of the claims which have been proved and allowed, and declares all dividends and prepares and delivers to the trustee dividend sheets showing the dividends declared and to whom payable.[7] The dividends are of

[1] B. A. 1898, Sec. 47, clauses 1 and 2.

[2] *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202.

[3] *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

[4] *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; Gen. Ord. 29. See also *In re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319.

[5] B. A. 1898, Sec. 47, clause 10.

[6] Gen. Ord. 17.

[7] B. A. 1898, Sec. 39, clause 1; Official Form No. 40; see Form No. 98, *post*.

an equal *per centum,* and are declared and paid on all allowed claims except such as have priority or are secured.[8] The first dividend should be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority, and such claims as have not been but probably will be allowed, equals five *per centum* or more of such allowed claims.[9]

The trustee receives the list of claims and dividends prepared by the referee, and forthwith serves a notice [10] upon the creditors whose names are included in this list, of the time and place where payment of the dividends will be made. The creditors are entitled to have at least ten days' notice, by mail to their respective addresses, unless they waive notice in writing, of the declaration and time of payment of the dividends.[11] The creditors may, either personally or by some person authorized in writing,[12] obtain such dividends from the trustee at the time and place mentioned in the notice. Where payments are made to attorneys it should clearly appear on whose account the payment is made.[13] A claimed indebtedness from one creditor of a bankrupt to another, growing out of transactions not connected with the bankruptcy proceedings, can not be litigated in such proceedings or adjusted in the distribution of dividends.[14]

Subsequent dividends are declared and paid upon like terms and in the same manner as the first dividend.[15] When the estate is ready to be closed, a final meeting of the creditors is called by the referee, of which at least a ten days' notice must be given to each creditor.[16] At this meeting the trustee is required to lay before the creditors detailed statements of the

[8] B. A. 1898, Sec. 65*a*.

[9] B. A. 1898, Sec. 65*b*.

[10] Official Form No. 41; see Form No. 99, *post*.

[11] B. A. 1898, Sec. 58*a*.

[12] See Creditor's letter to trustee in Official Form No. 41; see Form No. 99, *post*.

[13] *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

[14] *In re* Girard Glazed Kid Co., 136 Fed. Rep. 511, 14 Am. B. R. 485.

[15] B. A. 1898, Sec. 65*b*.

[16] B. A 1898, Sec. 58*a*.

administration of the estate.[17] He is also required to make a final report and file final accounts with the referee or the judge at least fifteen days before the day fixed for the final meeting. This report and account must be rendered under oath,[18] and must be clear and show the disposition made of all money.[13] The referee audits the account, and, if regular and proper, passes an order allowing the account and discharging the trustee.[19] This is the general plan of distributing the bankrupt's estate, provided by the bankrupt law. It is necessary to consider several of these steps more in detail, which will be done in the several sections of this chapter.

It may be observed that there is considerable difference between the method of distribution under this act and that pursued under the act of 1867. The principal point of difference is that the referee declares the dividends under the present statute instead of the creditors, as was done under the former act.[20]

§ 265. Who are entitled to share in the estate.

All creditors whose debts are duly proved and allowed are entitled to share in the bankrupt's property and estate. This includes creditors who have a priority or are secured as well as general creditors. Secured creditors are entitled to be paid to the extent of their security. Creditors having a priority are entitled to be paid in full. The general creditors share *pro rata*. There is no provision in the statute for paying dividends to creditors who have not proved their claims,[1] but a creditor who received an innocent preference and refused to surrender it has been held entitled to the surplus of the bankrupt's estate, not exceeding the balance due on his debt, after the other creditors have been paid in full.[2]

[17] B. A. 1898, Sec. 47, clause 7.

[18] See Official Forms Nos. 49 and 50; see Forms Nos. 93 and 94, *post*.

[19] Official Form No. 51; see Form No. 95, *post*.

[20] R. S. Secs. 5092 and 5093.

[1] See *In re* Hoyt, No. 6806 Fed. Cas., 3 N. B. R. 55.

[2] *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508.

The persons entitled to share in a particular dividend are such only as have proved their debts prior to its being declared by the referee. A creditor is not entitled to have his debt brought in for a dividend if not proved until after the order declaring the dividend is made.[3] This construction of the act is the only one that can give bearing and consistency to the proceedings. If additional debts may be brought into the computation after the referee has prepared his list of claims and dividends it would be subject to incessant fluctuations and renewals; and what would render it still more inconvenient and unequal in practice would be that even after the trustee had paid dividends under the rate to a part of the creditors, others might come in and arrest payments in progress to the residue, and, by presenting from day to day a new basis of distribution, dwindle down the *per centum* first established, and place those creditors to whom it was declared on a scale constantly descending in proportions. This would be in direct conflict with the evident intent of the statute.[4]

Where there are several funds, as in the case of a partnership, the firm creditors are entitled to be paid out of the firm property and the individual creditors out of the individual estates of the partners.[5] Should any surplus remain of the property of any partner after paying his individual debts, such surplus is added to the partnership assets and is applied to the payment of the partnership debts.[5] Should any surplus of the partnership property remain after paying the partnership debts, such surplus is added to the assets of the individual partners in the proportion of their respective interests in the partnership.[6] The distribution of a partnership estate and the individual estates of the partners is more fully discussed in another place, to which the reader is referred.[7]

[3] B. A. 1898, Sec. 65*c*; *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662; *In re* Miller, No. 9556 Fed. Cas., 1 N. Y. Leg. Obs. 180.

[4] B. A. 1898, Secs 65 *a* and *c*; *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[5] B. A. 1898, Sec. 5*f*.

[6] B. A. 1898, Sec. 5*f*.

[7] See Administration of partnership estates, Sec. 99, *ante*.

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor, when known, by the party contingently liable. When the name of the creditor is unknown such claim may be proved in the name of the party contingently liable, but no dividend is paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.[8]

§ 266. How and when dividends are declared.

Creditors are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of the declaration and time of payment of dividends.[1] The referee declares dividends and prepares and delivers to the trustee dividend sheets, showing the dividends declared and to whom payable.[2] From this provision it appears that the referee fixes and determines the rate of the dividend as well as makes the computation and calculations as to the amounts. The data for such calculations is in his possession; namely, the names of the creditors and the amount of each debt proved and allowed. The trustee is required to report to him, in writing, the condition of the estate and the amount of money on hand, and such other details as may be required by the court.[3] The first report must be made within a month after his appointment.[3] Other reports are required from him every two months thereafter, unless otherwise ordered by the judge or referee.[3] With this data the referee is prepared to declare the rate and compute the amount of each creditor's dividend.

Having determined upon the rate *per centum*, the referee prepares a list of debts, proved and allowed, stating the rate of dividend and the name of each creditor, alphabetically ar-

[8] Gen. Ord. 21, par. 4. B. A. 1898, Sec 65*c*; *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

[1] B. A. 1898, Sec. 58*a*.

[2] B. A. 1898, Sec. 39, clause 1; Form No. 40.

[3] B. A. 1898, Sec. 47, clause 10; Gen. Ord. 17.

ranged, together with the sum proved and allowed and the amount of the dividend to be paid thereon.[4] Where only one creditor has proved his claim he is entitled to be paid in full if there be enough for that purpose; if there be not enough he takes the whole.[5] This list of claims and dividends should be included by the referee in his record, and a copy delivered by him to the trustee. This is the authority for the trustee to make payments of dividends as set forth in such list.

Where a claim has been honestly and fairly disputed and the claimant finally prevails, interest upon the dividends should not be allowed from the time that like dividends were declared upon undisputed claims.[6] Interest may be allowed on all claims from the date of filing the petition if the bankrupt's estate is sufficient to pay the same to all.[7]

The rights of creditors, who have received dividends, or in whose favor final dividends have been declared, are not affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims are paid

[4] Official Form No. 40; see Form No. 98, *post*.

[5] *In re* Haynes, No. 6269 Fed. Cas., 2 N. B. R. 227; *In re* James, No. 7175 Fed. Cas., 2 N. B. R. 227.

[6] In Hersey, *et al*, v. Fosdick, 20 Fed. Rep. 44. Judge Lowell, in considering this question, said: "I can see no reason why, because a creditor finally prevails in a claim honestly and fairly disputed by the assignees, he should have more than his dividend. Not, surely, as damages for withholding something due him, for there is nothing due him in bankruptcy until his debt, both as to its legality and its amount, has been ascertained. Not as a matter of contract, for there is no contractural relation between the parties. I am confident that the practice has always been against it, and that it is both just and expedient that the general creditors should be at liberty to investigate doubtful claims, without the liability to such a penalty as would be imposed upon them by granting the petition. I do not say that if funds have been set aside to meet a large claim of this kind, and have earned interest, the court has not power to order the precise amount of interest so earned on a sum which proves to be the creditor's money, to be paid to him."

But see *In re* Kitzinger, No. 7862 Fed. Cas., 19 N. B. R. 238, and No. 7863 Fed. Cas., 19 N. B. R. 307.

[7] *In re* Hagan, No. 5898 Fed. Cas., 6 Ben. 407; *In re* Town, No. 14112 Fed. Cas., 8 N. B. R. 40.

dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.[8] It is not necessary before declaring a final dividend to wait a year,—the time within which Sec. 57*n* of the bankrupt act requires all claims to be proved.[9] Where an order is entered, by the consent of all known creditors, for a distribution different from that provided by the bankrupt act it is subject to the rights of any unknown creditors who appear within the time allowed by the act.[10]

Where a person has recovered a judgment, which is pending review in an appellate court, the court of bankruptcy will see to it that no dividends are paid until the case is disposed of by the appellate court. It will then be ordered to be paid or expunged, or ordered suspended, as shall be indicated by the judgment of the appellate court.[11] The proceedings in bankruptcy may go on in the usual way to their final orderly termination. If the judgment creditor shall not, in the meantime, have succeeded in getting his debt in a condition to receive dividends upon it, he will not be able to participate in the distribution of the estate as a judgment creditor.

The first dividend is required to be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five *per centum* or more of such allowed claims.[12] Dividends subsequent to the first are declared upon like terms as the first and as often as the amount equals ten *per centum* or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.[12]

[8] B. A. 1898, Sec. 65*c*; *In re* Hovey, 5 Fed. Rep. 356, affirmed, 8 Fed. Rep. 314. As to when domestic creditors are preferred in paying dividends to foreign creditors, see B. A. 1898, Sec. 65*d*.

[9] *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[10] *In re* Lockwood, 104 Fed. Rep. 794, 4 Am. B. R. 731.

[11] *In re* Sheehan, No. 12737 Fed. Cas., 8 N. B. R. 345.

[12] B. A. 1898, Sec. 65*b*.

§ 267. Debts which have priority.

In the distribution of an estate a secured creditor, as a mortgagee or lien holder, is entitled to be paid in full, or to the extent of the amount realized, from the funds derived from a sale of the property, which is subject to the specific lien or security, less expenses of foreclosing the lien,[1] including commissions of referee and trustee.[2] The trustee is required to pay the taxes of the bankrupt.[3]

Certain other debts have a priority by virtue of express provisions of the statute and should be paid in full before paying any debts of general creditors. Such debts are, and the order of payment is as follows:[4] *First.* Costs of preserving the estate subsequent to filing the petition. *Second.* Filing fees paid by creditors in involuntary cases, and the reasonable expense of creditors in recovering property transferred or concealed by the bankrupt. *Third.* Cost of administration. *Fourth.* Wages due workmen, etc. *Fifth.* Debts entitled to priority under the laws of the states or of the United States. These priorities are considered hereafter at length.[5]

In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made, is applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[6]

[1] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78.

[2] B. A. 1898, Secs. 40 and 48 as amended by the act of February 5, 1903, 32 Stat. at L. 797; *In re* Sanford Furniture Mfg. Co., 126 Fed. Rep. 888, 11 Am. B. R. 414; *In re* Iowa Falls Mfg. Co., 140 Fed. Rep. 527, 15 Am. B. R. 384.

[3] See Sec. *267a. post.*

[4] B. A. 1898, Sec. 64, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[5] Secs. *267a* to *267f.*

[6] B. A. 1898, Sec. *64c.*

When the referee has determined what debts are entitled to priority he should pass an order setting forth the names of the creditors and the amount of debts entitled to priority due each, and direct the trustee to pay such debts in full.

Where a secured creditor and a creditor having a priority are entitled to payment out of the same fund, and the fund is insufficient to pay both in full, the question will arise as to which class of creditors has preference over the other, the secured or those having priority? The statute creates preferences in the distribution of the bankrupt's assets, as has been stated, and prescribes the order of payment. This provision does not refer to any part of the estate derived from the sale of property on which creditors may have a specific lien. It will be observed that this priority is only allowed out of the estate of the bankrupt. The fund derived from the sale of property, which is subject to specific liens, becomes a part of the bankrupt's estate to such extent only as the fund exceeds the amount of the debt secured by the lien or mortgage.[7] The priority referred to in Sec. 64 relates to claims otherwise unsecured and gives them priority over other unsecured claims, but does not affect a debt or claim secured by mortgage or other lien which the act expressly provides shall not be affected by bankruptcy proceedings in Sec. 67. The claim of the lien creditor must therefore be paid in full before creditors are entitled to a priority under Sec. 64.[8]

§ 267a. Taxes.

The court is required by the bankrupt act [1] "to order the trustee to pay all taxes legally due and owing by the bankrupt to

[7] That the trustee takes the estate in the same plight and condition that the bankrupt held it and subject to all equities impressed upon it by the bankrupt, see York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633, and cases cited.

[8] *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re* Frick, 1 Am. B. R. 719; *In re* Bourlier Cornice Roofing Co., 133 Fed. Rep. 958, 13 Am. B. R. 585; *In re* McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387; see also *In re* Sanderlin, 109 Fed. Rep. 857, 859, 6 Am. B. R. 384, 387; Liddon Bros. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204; but see *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235.

the United States, state, county, district or municipality in advance of the payment of dividends to creditors." [1]

The test is given in the statute. Are the taxes "legally due and owing" by the bankrupt? If they are, the trustee should pay them in advance of the payment of dividends to creditors.[2] Whether a tax is "legally due and owing" depends upon the local law. The general rule is that a tax is legally due and owing from the day of assessment, although not payable until a later date.[3] It has been held that a tax assessed against a bankrupt prior to adjudication was legally due and owing within the meaning of Section 64, although not payable until after adjudication.[4]

Money collected by a bankrupt tax collector for a county is not a tax "due and owing" so as to be entitled to priority of payment.[5]

Whether a claim is for a tax within the meaning of Section 64*a* is a question to be decided by the court of bankruptcy and not by the state courts.[6] Section 64*a* declares that in case of

[1] B. A. 1898, Sec. 64*a*.

[2] Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 11 Am. B. R. 481; Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed Rep. 600, 15 Am. B. R. 195; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300.

[3] *In re* Flynn, 134 Fed. Rep. 145, 13 Am. B. R. 720; *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351; New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 63.

As to the date of a foreign corporation tax in Ohio see Emmerman v. Specialty Co., 13 Am. B. R. 40, *note*.

[4] *In re* Flynn, 134 Fed. Rep. 145, 13 Am. B. R. 720; New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 63.

[5] *In re* Waller, 142 Fed. Rep. 883, 15 Am. B. R. 753.

[6] In New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 63, the supreme court said: "While we take this view of the decisions of the Supreme court of New Jersey and reach the conclusion that the claim in question is for a tax within the meaning of the law as construed by that court, the bankruptcy act is a federal statute, the ultimate interpretation of which is in the Federal courts. It is doubtless true, as was said in the opinion of the learned judge speaking for the Circuit Court of Appeals, in this case, that if the highest court of the state should decide that a given statute imposed no tax within the meaning of the law as interpreted by it, a Federal court, in passing upon the bankruptcy act, would not compel the state to accept a preference from the bankrupt's estate upon a different view of the law. Conceding the

disputes as to the amount or legality of any such taxes, they are to be heard and determined by the court. The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of the bankruptcy act, giving a preference to taxes, is a federal question to be decided by the courts of the United States.[7] It has been held that a franchise fee imposed upon corporations by the state under whose laws they are incorporated, is a tax entitled to priority.[8] An assessment for local improvements has been held to be a tax entitled to priority.[9] Where a partner is liable for partnership debts, such taxes have been given priority as against the partner's estate in bankruptcy, when there were no partnership assets.[9*] In the following instances priority has been refused on the ground that the claim was not a tax, namely: a liquor license,[10] a debt due the state on a judgment,[11] or a claim for taxes, which the bankrupt agreed to pay on property which he leased, because his liability was entirely contractural.[12]

Taxes are put at the head of everything payable out of the general fund in the hands of the trustee. The taxes due by the bankrupt should be paid in full before paying debts entitled to priority under Section 64*b*,[13] as well as in advance of all debts of general creditors.

doctrine that the meaning of a statute is a state question, except where rights, the subject of adjudication by the Federal courts, have accrued before its construction by the state court, or the question of contract within the protection of the Federal constitution is involved, still a state court, while entitled to great consideration, can not conclusively decide that to be a tax within the meaning of a Federal law, providing for the payment of taxes, which is not so in fact."

[7] New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 63.

[8] New Jersey v. Anderson, 203 U. S. 483, 17 Am. B. R. 63; reversing *In re* Cosmopolitan Power Co. (C. C. A. 7th Cir.), 137 Fed. Rep. 858, 14 Am. B. R. 604; *In re* Danville Rolling Mill Co., 121 Fed. Rep. 432, 10 Am. B. R. 327.

[9] *In re* Stalker, 123 Fed. Rep. 961, 10 Am. B. R. 710.

[9*] *In re* Green, 116 Fed. Rep. 118, 8 Am. B. R. 553.

[10] *In re* Ott, 95 Fed. Rep. 274, 2 Am. B. R. 637.

[11] *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

[12] *In re* Broom, 123 Fed. Rep. 639, 10 Am. B. R. 427.

[13] *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675, after considering the terms of Secs. 64 *a* and *b*, Judge Archibald said: "Taxes, as a class, are thus put at the

There is some conflict in the opinions as to whether the trustee or secured creditors should pay the taxes on encumbered property. The better rule is that the trustee must pay all taxes owing by the bankrupt on all of his property at the date of bankruptcy, irrespective of its condition with reference to encumbrances.[14] The reason is that a tax is a personal debt against the taxpayer, which is given priority by the express terms of the bankrupt act. There is some authority for limiting the taxes payable by the trustee to such as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have against the property which the trustee relinquished to secured creditors.[15] Giving the words of the statute their plain meaning, it is clear that the trustee should pay all taxes owing by the bankrupt at the date of bankruptcy, whether the property taxed is administered by the trustee or not,[16] as where the property on which the taxes are owing is exempt by law and does not pass to the trustee,[17] or where mortgaged property never comes into the possession of the trustee,[18] or where mortgaged property is relinquished to the mortgagee because the mortgaged debt exceeds the value of the property,[19] or where mortgaged property is sold by the trustee free of liens.[20]

head of everything—even above the expenses of preserving the estate or the cost of administering it."

[14] Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 15 Am. B. R. 195; Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 11 Am. B. R. 481; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

[15] *In re* Stalker, 123 Fed. Rep. 961, 10 Am. B. R. 710; *In re* Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122; *In re* Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112.

[16] Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 15 Am. B. R. 195; Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 11 Am. B. R. 481; *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

[17] *In re* Tilden, 91 Fed. Rep. 500, 1 Am. B. R. 300.

[18] Waco v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 79, 11 Am. B. R. 481.

[19] Chattanooga v. Hill (C. C. A. 6th Cir.), 139 Fed. Rep. 600, 15 Am. B. R. 195

The mortgagee is free to agree to pay taxes on condition that the property is surrendered to him, as was done in Equitable Loan Co. v. Moss (C. C. A. 5th Cir.), 125 Fed. Rep. 609, 11 Am. B. R. 111.

[20] *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re*

Whether a purchaser at a sale may be required to pay taxes depends upon the contract of sale. If he buys subject to liens, he must pay the taxes.[21] If he buys free of all liens, the trustee must pay the taxes.[22] To prevent any controversy on this point the order of sale made by the referee should specify particularly what taxes to be paid by the purchaser. Where a purchaser or other person pays taxes, he is not entitled to priority by invoking the doctrine of equitable subrogation to any right of the sovereign in this respect.[23]

Funds of the bankrupt which have come into the hands of the trustee are subject to taxation in the district where they would be taxable if bankruptcy had not intervened.[24] If property in the hands of an assignee, trustee, executor or administrator is not taxable under the local law, it is not taxable in the hands of a trustee in bankruptcy. Where property in the possession of the bankrupt is taxed by the local authorities, the trustee should pay these taxes in the same manner as the taxes due at the time of bankruptcy are paid.

A claim for taxes may be proved like any other claim, but it is not necessary to file a proof of claim.[25] Taxes are regularly paid by order of the referee. When the trustee files the receipts of the proper public officers for such payment, he is credited with the amount thereof, and in case any question

Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351.

But see *In re* Veitch, 101 Fed. Rep. 251, 4 Am. B. R. 112, and *In re* Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122.

[21] *In re* Hollenfeltz, 94 Fed. Rep. 629, 2 Am. B. R. 499; *In re* Gerry, 112 Fed. Rep. 958, 7 Am. B. R. 459; *In re* Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122; *In re* Fisher & Co., 148 Fed. Rep. 907.

[22] *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351.

[23] *In re* Brinker, 128 Fed. Rep. 634, 12 Am. B. R. 122; Cooper Grocery Co. v. Bryan (C. C. A. 5th Cir.), 127 Fed. Rep. 815, 11 Am. B. R. 734.

[24] Swarts v. Hammer, 194 U. S. 441, 48 L. Ed. 1060, 11 Am. B. R. 708, affirming 120 Fed. Rep. 256, 9 Am. B. R. 691; *In re* Sims, 118 Fed. Rep. 356, 9 Am. B. R. 162; *In re* Conhaim, 100 Fed. Rep. 268, 4 Am. B. R. 58; *In re* Keller, 109 Fed. Rep. 131, 6 Am. B. R. 351; *In re* Fisher & Co., 148 Fed. Rep. 907.

[25] *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

arises as to the amount or legality of any such tax, the matter may be heard and determined by the court.[26]

§ 267b. First: Costs of preserving the estate.

Of the debts entitled to payment in full next after the taxes and before paying any debts of general creditors, the first class in order of payment is "the actual and necessary cost of preserving the estate subsequent to filing the petition." [1]

This is really a cost of administration, which may be included in the third class of debts enumerated in Section 64*b*, but Congress saw fit to provide for the payment of the cost of preserving the estate in advance of other costs of administration. It includes rent, charges for storage, insurance and the compensation of a receiver, marshal, watchman or keeper in caring for and preserving the property. In fact, it includes every necessary expense incident to the preservation of the estate of the bankrupt from the time the petition is filed.[2] It does not include all expenses and disbursements of receivers and other officers pending adjudication and the appointment of trustees, but only such expenses of officers or parties as are incurred in preserving the estate. The court is not bound to allow the full sum actually expended, but only so much as it shall find to have been reasonable and necessary for the purpose.[3]

The actual and necessary expenses incurred for preserving the property should be reported in detail, under oath, and examined and approved or disapproved by the court.[4] Section 62 provides the manner of proving and allowing such claims and for the payment of such expenses. Section 64*b* provides the order in which they shall be paid.

This provision relates only to the preservation of the prop-

[26] B. A. 1898, Sec. 64*a*.

[1] B. A. 1898, Sec. 64*b*, clause 1.

[2] *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Alison Lumber Co., 137 Fed. Rep. 643, 648, 14 Am. B. R. 78; *In re* Little River Lumber Co., 101 Fed. Rep. 558, 3 Am. B. R. 682.

[3] *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

[4] B. A. 1898, Sec. 62.

erty after the petition is filed. The courts, however, will allow a receiver or assignee or his attorney pay for services rendered in preserving the estate prior to the filing of the petition in so far as such services are beneficial to the estate.[5]

§ 167c. Second: Filing fees and expenses of recovering property.

Of the debts entitled to payment in full next after the taxes, and before paying any debts of general creditors, the second class in order of payment is the filing fees paid by creditors in involuntary cases,[1] and, since the amendment of 1903, where property of the bankrupt, transferred or concealed by him, either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.[2] Such expenses were allowed by the court under its general equity powers before the amendment.[3]

§ 167d. Third: Costs of administration.

Of the debts entitled to payment in full next after the taxes and before paying any debts of general creditors, the third class in order of payment is the cost of administration.[1]

Cost of administration includes the fees and mileage payable to witnesses as provided by the laws of the United States.[2] It must appear that the witness fees have been actually paid

[5] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re* Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 10 Am. B. R. 677; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 10 Am. B. R. 254; *In re* Zier & Co. (C. C. A. 7th Cir.), 142 Fed. Rep. 102, 15 Am. B. R. 646.

[1] B. A. 1898, Sec. 64*b*, clause 2. *In re* Silverman, 97 Fed. Rep. 325, 3 Am. B. R. 227. See also B. A. 1898, Sec. 3*c*; Gen. Ord. 34; Sec. 88, *ante*.

[2] 32 Stat. at L. 797.

[3] *In re* Lesser, 100 Fed. Rep. 433, 3 Am. B. R. 815, affirmed by C. C. A. 2d Cir., in 5 Am. B. R. 320; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

[1] B. A. 1898, Sec. 64*b*, clause 3.

[2] B. A. 1898, Sec. 64*b*, clause 3. R. S. Secs. 848, 849; Hoffschlaeger Co. v. Young Nap, 12 Am. B. R. 526.

before they are entitled to priority.[3] Mileage can only be allowed upon showing the residence or place of business, or the distance necessarily traveled by the witness.[4]

Costs of administration also include one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties by the statute prescribed and to the bankrupt in voluntary cases, as the court may allow.[5] It will be observed that attorney's fees are allowed as costs of administration in three classes of cases. The priority is allowed for professional services only,[6] and only a reasonable fee for services actually rendered,[7] the amount of which is to be determined by the court.[8] The subject of attorney's fees is considered elsewhere.[9]

The actual and necessary expenses incurred by officers in the administration of an estate are entitled to priority under this clause.[10] Such expenses include rent, premiums for insurance, money paid for care and storage of the property, for marshal's fees, for advertising and giving notice to creditors, for premiums to bonding company for trustee's bond, to a stenographer employed under Section 38*a*, clause 5, for traveling and incidental expenses of a referee or trustee and those of any clerk or other officer attending him in the performance

[3] Hoffschlaeger Co. v. Young Nap, 12 Am. B. R. 526.

[4] *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

[5] B. A. 1898, Sec. 64*b*, clause 3.

[6] *In re* Connell & Sons, 120 Fed. Rep. 846, 9 Am. B. R. 474.

[7] *In re* Rosenthal, 120 Fed. Rep. 848, 9 Am. B. R. 626; *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

[8] *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; Smith v. Cooper (C. C. A. 5th Cir.), 120 Fed. Rep. 730, 11 Am. B. R. 755; *In re* Goldville Mfg. Co., 118 Fed. Rep. 892, 10 Am. B. R. 552.

[9] See Sec. 41*a*, *ante*.

[10] *In re* Daniels, 130 Fed. Rep. 597, 12 Am. B. R. 446; *In re* Tebo, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; *In re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731, 8 Am. B. R. 651; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re* Pierce, 111 Fed. Rep. 516, 6 Am. B. R. 747; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am.

of his duties, and any other necessary expense actually incurred by the referee, trustee, receiver or marshal incident to the management or settlement of the estate. The expenses of a sale including advertisement, appraisement, auctioneer's fees, etc., are entitled to priority as costs of administration. Such expenses are usually paid out of the proceeds of the sale, which belongs to the general creditors. Where a court of bankruptcy sells mortgaged property, it is only fair that the secured creditor bear his proportion of these expenses.[11] Money advanced for expenses by the bankrupt or other person is entitled to priority as costs of administration.[12] A deficiency resulting from continuing the business of the bankrupt has been allowed priority over general creditors,[13] but not as against claims of secured creditors.[14] Costs awarded against a trustee in a state court have been ordered paid in full, but not a judgment for damages for detention of property.[15]

The expenses of administration must be reported in detail, under oath, and examined and approved by the court.[16] The accounts should be itemized, with proper vouchers when vouchers can be procured, and the affidavit should state that the amounts charged were necessary, just and reasonable.[17] The expenses of a trustee are usually made in his regular reports to the court and are allowed upon confirmation of such reports. If an officer fails to itemize and verify his account, the court

B. R. 675; *In re* Lengert Wagon Co., 110 Fed. Rep. 927, 6 Am. B. R. 535; *In re* Pattee, 143 Fed. Rep. 994, 16 Am. B. R. 450; *In re* Castleberry, 143 Fed. Rep. 1021, 16 Am. B. R. 431.

[11] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Alison Lumber Co., 137 Fed. Rep. 643, 14 Am. B. R. 78; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; McNair v. McIntyre (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

[12] Gen. Ord. 10; *In re* Hatcher, 145 Fed. Rep. 658, 16 Am. B. R. 722.

[13] *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

[14] *In re* Bourlier Cornice & Roofing Co., 133 Fed. Rep. 958, 13 Am. B. R. 585; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

[15] *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

[16] B. A. 1898, Sec. 62; Gen. Ords. 19 and 26.

[17] Gen. Ords. 19 and 20.

will not allow it.[18] It is not necessary to give creditors notice before allowing items of expense as a cost of administration.[19] The court is not bound to allow the full sum actually expended, but only so much as it shall find to have been reasonable and necessary for the purpose.[20] Section 62 provides the manner of proving and allowing expenses of officers in administering an estate and for the payment of such accounts. Section 64*b* gives such accounts priority of payment.

§ 267e. Fourth: Labor claims.

Of the debts entitled to payment next after the taxes and before paying any debts of general creditors the fourth class in order of payment is wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant.[1]

The claim of a salesman employed in a shop is entitled to priority.[2] The claim of an apprentice for labor done after his apprenticeship under an agreement for a specific compensation is entitled to priority as the claim of a workman.[3] The fact that a laborer is paid by the piece does not do away with his right to priority.[4] A claim of one temporarily employed in adjusting the books and accounts of the bankrupt is entitled to priority as a clerk.[5] So long as a *bona fide* contract for hiring exists and the servant does all that the master requires of him, the wages are earned so vacation pay is "wages earned" and

[18] *In re* Daniels, 130 Fed. Rep. 597, 12 Am. B. R. 446; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; *In re* Hoyt, 119 Fed. Rep. 987, 9 Am. B. R. 574.

[19] *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641.

[20] *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

[1] B. A. 1898, Sec. 64*b*, clause 4. Traveling and city salesmen were included by the amendment of June 15, 1906, 34 Stat. at L.

[2] *In re* Flick, 105 Fed. Rep. 503, 5 Am. B. R. 465.

[3] *In re* Steiner, No. 13354 Fed. Cas., 1 Pa. L. J. 368.

[4] *In re* Gurewitz (C. C. A. 2d Cir.), 121 Fed. Rep. 982, 10 Am. B. R. 350.

[5] *Ex parte* Rockett, No. 11977 Fed. Cas., 2 Low. 522.

"due" although payment is deferred.[6] A father is entitled to priority for the services rendered by his minor son as a workman.[7] But where the claim arises under an entire contract for labor, including the services of a team, it can not be apportioned, and is not entitled to priority.[8]

An assignee of wages due for labor is entitled to priority of payment, whether the assignment was made before or after the commencement of bankruptcy proceedings.[9] The Supreme Court has said,[10] "The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant." A person who loans money to pay wages is not subrogated to the rights of the laborers or entitled to priority.[11] The reason is that where a claim for wages is paid, it is extinguished and no priority can attach to it. Where the claim is sold or assigned it still exists and is entitled to priority. It is a general rule in equity that one who furnished money to pay preferential claims is not entitled to priority over other creditors. Subrogation exists by virtue of contract with the claimant and not by any agreement with the debtor. A person who loans money to pay labor claims is a general creditor.

The claims of a traveling salesman,[12] an agent selling on commission,[13] the president [14] or general manager [15]

[6] *In re* Gladding Co., 120 Fed. Rep. 709, 9 Am. B. R. 700.

[7] *In re* Harthorn, No. 6162 Fed. Cas., 4 N. B. R. 103.

[8] *In re* Blackman, 6 Chi. Leg. News. 18.

[9] *In re* Campbell, 102 Fed. Rep. 686, 4 Am. B. R. 535.

[9] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186; *In re* Harmon, 128 Fed. Rep. 170, 11 Am. B. R. 64; *In re* Campbell, 102 Fed. Rep. 686, 4 Am. B. R. 535; *In re* Brown, No. 1974 Fed. Cas., 4 Ben. 142.

But see *In re* Westlund, 99 Fed. Rep. 399, 3 Am. B. R. 646.

[10] Shropshire, Woodliff & Co. v. Bush, 204 U. S. 186.

[11] Theobald v. Hammond (C. C. A. 6th Cir.), 133 Fed. Rep. 525; *In re* North Carolina Car Co., 127 Fed. Rep. 178, 11 Am. B. R. 488; *In re* St. Louis Ice Mfg. & Storage Co., 147 Fed. Rep. 752.

[12] *In re* Greenewald, 99 Fed. Rep. 705, 3 Am. B. R. 696; *In re* Scanlan, 97 Fed. Rep. 26, 3 Am. B. R. 202.

[13] *In re* Mayer, 101 Fed. Rep. 227, 4 Am. B. R. 119.

[14] *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154.

[15] *In re* Grubbs-Wiley Grocery Co., 96 Fed. Rep. 183, 2 Am. B. R.

of a corporation are not entitled to priority. An employee is not entitled to priority in payment of wages for an unexpired term of employment, where he was wrongfully discharged.[16] The priority for wages extends to wages earned within three months immediately preceding the filing of the petition, and not the three months last employed.[17] A person having a labor claim entitled to priority does not lose his priority by having obtained a judgment on it within four months prior to the filing of the petition.[18]

Where a state statute gives priority to wages earned more than three months prior to insolvency proceedings, such claims are not entitled to priority under Section 64*b*, clause 5, of the bankrupt act, as Section 64*b*, clause 4, is held to exclude claims for wages from Section 64*b*, clause 5.[19] Where, however, the state law gives not a priority, but a lien on the bankrupt's property and this lien becomes fixed before the petition in bankruptcy is filed, it will be respected.[20] If the labor claimant fails to comply the state statute so as to create a lien, his claim is not entitled to priority.[21]

§ 267f. Debts entitled to priority under the laws of the states or United States.

Of the debts entitled to payment next after the taxes and before paying any debts of general creditors the fifth class in order of payment is debts owing to any person who by the laws of the states or the United States is entitled to priority.[1]

[16] *In re* Pevear, No. 11053 Fed. Cas., 17 N. B. R. 461.
Fed. Rep. 96, 1 Am. B. R. 234.

[17] *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96, 1 Am. B. R. 234.

[18] *In re* Anson, 101. Fed Rep. 698, 4 Am. B. R. 231.

[19] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; *In re* Shaw, 109 Fed. Rep. 782, 6 Am. B. R. 501; *In re* Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 9 Am. B. R. 635.

[20] *In re* Lawler, 110 Fed. Rep. 135, 6 Am. B. R. 184; *In re* Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 6 Am. B. R. 1; see also *In re* City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 10 Am. B. R. 231.

[21] *In re* Burton Bros. Mfg. Co., 134 Fed. Rep. 157, 14 Am. B. R. 218.

[1] B. A. 1898, Sec. 64*b*, clause 5.

This clause does not adopt the state laws with reference to the priority of labor claims.[2]

Where a claimant has a lien he is preferred not because Sec. 64*b*, clause 5, of the bankrupt act, gives him priority, but because the bankrupt act recognizes all valid liens,[3] which it does not specifically dissolve. Thus where a state law gives a lien for one year's rent, on the goods on the premises, the landlord is entitled to the proceeds of the sale of such goods up to that amount.[4] Where no lien is created in favor the landlord his claim for rent is not entitled to priority.[5] A mere judgment is not entitled to priority though due to the state;[6] and when a judgment becomes a lien depends upon the laws of the state in which it is asserted.[7] This clause of the bankrupt act does not make all liens under the state laws equal, but leaves them the priorities which the state law gives them.[9] So where the state statutes give a lien to both landlord and a wage-earner their priority will be determined by the state law.[9] Where the state law gives no priority over other creditors for money due the county by a delinquent tax collector it is not entitled to priority in bankruptcy.[10] A state law exempting wages or salary will be enforced in bankruptcy.[11] Where a landlord distrains for rent after adjudication he will not be en-

[2] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; *In re* Shaw, 109 Fed Rep. 782, 6 Am. B. R. 501; *In re* Slomka (C. C. A. 2d Cir.), 122 Fed. Rep. 630, 9 Am. B. R. 635. Where, however, the labor claimant has acquired a lien it may be valid against the trustee in bankruptcy; *In re* Lawler, 110 Fed Rep. 135, 6 Am. B. R. 184; *In re* Laird (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 6 Am. B. R. 1; see also *In re* City Trust Co. (C. C. A. 6th Cir.), 121 Fed. Rep. 706, 10 Am. B. R. 231.

[3] B. A. 1898, Sec. 67*d*.

[4] *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.

[5] *In re* Whealton Restaurant Co., 143 Fed. Rep. 921, 16 Am. B. R. 294.

[6] *In re* Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

[7] Pence v. Cochran, 6 Fed. Rep. 269; *In re* Lowe, 19 Fed. Rep. 589.

[8] Falls City Shirt Mfg. Co., 98 Fed. Rep. 592, 3 Am. B. R. 437.

[9] *In re* Byrne, 97 Fed. Rep. 762, 3 Am. B. R. 268.

[10] *In re* Waller, 142 Fed. Rep. 883, 15 Am. B. R. 753.

[11] *In re* Holden, 127 Fed. Rep. 980, 12 Am. B. R. 96.

titled to the amount distrained for as the property is in *custodia legis*, but will be given the priority which the state law gives to a landlord in case of execution.[12] Where, as in Pennsylvania, the vendor has no lien on real estate for the purchase price, but a bare legal title, if the trustee of the vendee severs part of the structures and sells them, the proceeds go to the general creditors.[13]

The insolvency laws of the states are considered as remaining in force since the passage of the bankruptcy act, so where these laws give priority to certain debts when the estate is administered in insolvency, the same priorities will ordinarily be allowed when the estate is administered in bankruptcy.[14] If the state statute gives not a priority, but a lien, and the lien is dissolved by the bankruptcy proceedings, the leinor is entitled to no priority.[15] Where the priority given by the state law was to claims for compensation and for expenses incurred by an assignee in insolvency, a doubtful question arose when the assignment was set aside by the bringing of bankruptcy proceedings within four months. It was held that such a general assignment was in fraud of the bankrupt act and therefore such debts were not only entitled to priority, but were not even provable claims.[16] This doctrine was repudiated by

[12] *In re* Duble, 117 Fed. Rep. 794, 9 Am. B. R. 121.

[13] *In re* Clark, 118 Fed. Rep. 358, 9 Am. B. R. 252. See also *In re* Hamilton, 102 Fed. Rep. 683, 4 Am. B. R. 543.

[14] *In re* Worcester Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496; *In re* Crow, 116 Fed. Rep. 110, 7 Am. B. R. 545; *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51.

In re Beaver Coal Co, 107 Fed. Rep. 98, 5 Am. B. R. 787, seems contra.

Where the priority is given in the settlement of a partnership no priority will be given in administration of the estate of one of the partners in bankruptcy. *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699.

[15] *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

[16] Stearns v. Flick, 103 Fed. Rep. 919, 4 Am. B. R. 723; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; Wilbur v. Watson, 111 Fed. Rep. 493, 7 Am. B. R. 54; *In re* Tatum, 112 Fed. Rep. 50, 7 Am. B. R. 52; *contra In re* Scholtz, 106 Fed. Rep. 834, 5 Am. B. R. 782.

the supreme court in *Randolph* v. *Scruggs*,[17] and it is now settled that an assigneee or his attorney are entitled to compensation for services rendered either before or after the filing of the petition, if the services rendered were beneficial to the estate, and this claim is entitled to priority.[18]

Costs and sheriff fees incurred in an attachment proceeding within four months of bankruptcy, which is avoided by Section 67*f*, are not entitled to priority of payment, unless there is a provision in the state statute creating a lien in favor of such charges.[19] Where a lien exists under the state statute in favor of a sheriff or party for costs in such a proceeding it will be recognized in a court of bankruptcy[20] as where a lien was created by attachment proceedings more than four months prior to bankruptcy.[21]

The United States are entitled to priority, although they do not prove their debt, irrespective of the form of indebtedness.[22] Where a person purchases an article duty free, and is compelled to pay the duty in order to get possession of the property, he is entitled to be subrogated to the right of the United States to priority, although he proves his debt is unsecured.[23] Where a revenue officer has paid a dishonored check, received

[17] 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[18] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re* Chase (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 13 Am. B. R. 677; Summers v. Abbott (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 10 Am. B. R. 254; *In re* Pattee, 143 Fed. Rep. 994, 16 Am. B. R. 450.

[19] *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Copper King, 143 Fed. Rep. 649, 16 Am. B. R. 148; *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 670; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699; *In re* Jennings, 8 Am. B. R. 358.

[20] *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Goldberg & Bros., 144 Fed. Rep. 566, 16 Am. B. R. 521.

[21] *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542, affirming 6 Am. B. R. 404, 110 Fed. Rep. 630.

[22] R. S. Sec. 3466; *In re* Stoever, 127 Fed. Rep. 394, 11 Am. B. R. 345; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513; U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275; *In re* Vetterlein, 20 Fed. Rep. 109; Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104.

See also U. S. v. Murphy, 15 Fed. Rep. 589, and collation of cases in note at the end of the opinion.

[23] *In re* Kirkland, No. 7844 Fed. Cas., 14 N. B. R. 157.

by him from a government debtor, he is entitled to be subrogated to the rights of the United States against such debtor[24] Where the United States have obtained a judgment against persons composing a bankrupt firm, though for a debt on which one of the partners was liable as principal and the other as surety, they are entitled to priority over all partnership creditors.[25] A judgment for an internal revenue penalty recovered after the adjudication in bankruptcy is entitled to priority of payment.[26] Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture are allowed only for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.[27] Hence the priority of the United States is limited in respect to what may be allowed.

§ 268. Dividends are not subject to attachment.

A dividend in the hands of the trustee can not be reached by attachment or on any process from a state court.[1] The same rule holds in cases of money payable under a composition with creditors.[2] The reason for this rule is that while the funds are in the hands of the trustee they are a part of the estate of the bankrupt in the custody of the court. Such money is not the property of the debtor, but is property only which becomes his, when he actually gets it. He can not maintain any suit against the trustee for it, nor obtain it by any legal process other than an application to the court of bankruptcy having control of the funds, as a party to the pro-

[24] *In re* McBride, No. 8662 Fed. Cas., 19 N. B. R. 452.

[25] *In re* Strassburger, No. 13526 Fed. Cas., 4 Woods, 557.

[26] *In re* Rosey, No. 12066 Fed. Cas., 6 Ben. 507.

[27] B. A. 1898, Sec. 57*j*.

[1] *In re* Chisholm, 4 Fed. Rep. 526; Gilbert v. Quinby, 1 Fed. Rep. 111; *In re* Cunningham, No. 3478 Fed. Cas., 19 N. B. R. 276; *In re* Kohlsaat, No. 7918 Fed. Cas., 18 N. B. R. 570; *In re* Bridgman, No. 1867 Fed. Cas., 2 N. B. R. 252; Colby v. Coates, 6 Cush. (Mass.) 558.

[2] *In re* Kohlsaat, No. 7918 Fed. Cas., 18 N. B. R. 570.

ceedings in that court. The situation is very similar to that of money in the hands of a public officer due to a private person, and the familiar cases relating to the exemption of such funds from attachment, to prevent them from passing to the person who claims them, may be profitably consulted.[3]

§ 269. The manner of paying dividends.

A dividend sheet, showing the dividends declared and payable, is delivered by the referee to the trustee.[1] The trustee should forthwith give notice to the creditors when and where a check or warrant for the dividend may be obtained.[2] The trustee is required to pay dividends within ten days after they are declared by the referee.[3] If the creditor can not personally attend, the warrant may be delivered to a person authorized in writing to receive it.[4] At the time and place named in the notice the creditor should present himself, or a duly authorized agent, to receive and receipt for the dividend warrant.

Each dividend is paid by a check or warrant drawn upon the designated depository in which the fund is deposited.[5] The warrant or check must be signed by the clerk of the court or by the trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the time, and the account for which it is drawn.[6] The warrant is usually drawn by the trustee and

[3] Buchanan v. Alexander, 4 How. 20, 11 L. Ed. 857; McLaughlin v. Swann, 18 How. 217, 15 L. Ed. 357; Providence & Stonington Steamship Co. v. Ins. Co., 11 Fed. Rep. 284; Clarke v. Shaw, 28 Fed. Rep. 356; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845; Foley v. Shriver, 81 Va. 568; Roeller v. Ames, 33 Minn. 132; Gassett v. Grout, 4 Met. (Mass.) 486.

[1] B. A. 1898, Sec. 39, clause 1; Form No. 40.

[2] Official Form No. 41, see Form No. 99, *post*.

[3] B. A. 1898, Sec. 47, clause 9.

[4] Official Form No. 41, see Form No. 99, *post*.

[5] B. A. 1898, Sec. 47, clause 4.

[6] Gen. Ord. 29; *In re* Cobb, 112 Fed. Rep. 655, 7 Am. B. R. 202; see also *In re* Rude, 101 Fed. Rep. 805, 4 Am. B. R. 319; *In re* Clark, No. 2810 Fed. Cas., 9 N. B. R. 67.

countersigned by the referee. Where the checks are given to attorneys they should distinctly show in payment of which claim they are given.[7] An entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, must be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts should be entered in the order of time in which they are drawn, and numbered in the case of each estate.[8] The creditor receiving the check is required by the trustee to sign a voucher to be used in making up his accounts.

§ 270. Unclaimed dividends.

There was a conflict of opinion under the former act as to what disposition should be made of the balance that remained after the payment of all the creditors, who had proved their debts in case there were names of creditors on the schedule who had not proved their debts. Some judges held that it should be distributed among the creditors holding unproved claims.[1] Other judges held that it should be paid to the bankrupt.[2]

This question can not be mooted under the present act, which expressly provides that dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt. Provided, that in case unclaimed dividends belong to minors,

[7] *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

[8] Gen. Ord. 29.

[1] *In re* Haynes, No. 6269 Fed. Cas., 2 N. B. R. 227; *In re* James, No. 7173 Fed. Cas., 2 N. B. R. 227.

[2] *In re* Hoyt, No. 6806 Fed. Cas., 3 N. B. R. 55; Steevens v. Earles, 25 Mich. 40.

In re Blight's Estate, No. 1540 Fed. Cas., 1 Pa. Law J. 225, it was held that unclaimed dividends would not be awarded to a bankrupt's administrator when opposed by creditors whose claims were not paid in full.

such minors may have one year after arriving at majority to claim such dividends.[3]

§ 271. The settlement of the estate.

When the trustee has realized all the property of the bankrupt, or so much thereof as can be realized, or where no tangible assets have come into his hands and he has no information of any property belonging to the bankrupt, and the estate has been distributed or is in shape for a final dividend, the estate is ripe for settlement. The final dividend may be declared before the time limited for proving claims has expired.[1] The trustee thereupon makes a final report and files his final accounts under oath with the referee.[2] This should be done at least fifteen days before the day fixed for the final meeting of the creditors.[3]

The referee should thereupon give at least ten days' notice by mail to the creditors, at their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case, unless they waive notice in writing, of the filing of the final accounts of the trustee and the time when and the place where they will be examined and passed upon.[4] Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.[5] But if no trustee is appointed, the court may order that no meeting of the creditors other than the first meeting shall be called.[6]

Upon the day fixed for the final meeting the creditors assemble pursuant to notice. The trustee is required to lay before this meeting of the creditors detailed statements of the administration of the estate. These statements and accounts are examined at this time, and such other business as may be

[3] B. A. 1898, Sec. 66.

[1] *In re* Stein, 94 Fed. Rep. 124, 1 Am. B. R. 662.

[2] Official Forms Nos. 49 and 50, see Forms Nos. 93 and 94, *post*. If there are no assets the trustee makes his return in Official Form No. 48; see Form No. 92, *post*.

[3] B. A. 1898, Sec. 47, clause 8.

[4] B. A. 1898, Sec. 58a; *In re* Savage, 12 Fed. Rep. 719.

[5] B. A. 1898, Sec. 55*f*.

[6] Gen. Ord. 15.

necessary to the final settlement of the affairs of the bankrupt may be transacted. The creditors may, by vote at the final meeting, dispense with the reading and exhibition of the trustee's accounts and vouchers, where they have been on file for a reasonable time.[7]

If the final accounts are satisfactory and proper the referee passes and order allowing the same and discharging the trustee from his trust.[8] If objections are made to the accounts the referee should hear them and determine the merits as soon as he conveniently can do so. No objection should be allowed after a distribution has been confirmed.[9] The meeting may be adjourned with leave to the trustee to correct his errors or omissions.[10]

§ 271a. Reopening a case.

The statute expressly authorizes the court to reopen estates whenever it appears that they were closed before being fully administered.[1] This may be done upon a showing made *ex parte*.[2] Whether a proper case is made for reopening an estate rests in the sound discretion of the court.[3] After an order reopening an estate is made the creditors should elect a new trustee at their first meeting.[4] The new trustee, upon his qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt the same as the original trustee.[5] He has the same power to recover property which has been concealed or transferred

[7] *In re* Merchants Ins. Co., No. 9442 Fed. Cas., 6 Biss. 252.

[8] Official Form No. 51, see Form No. 95, *post*.

[9] *In re* Heebner, 132 Fed. Rep. 1003, 13 Am. B. R. 256.

[10] *In re* Savage, 12 Fed. Rep. 719.

[1] B. A. 1898, Sec. 2, clause 8; *In re* Barton's Estate, 144 Fed. Rep. 540, 16 Am. B. R. 569; *In re* Ryburn, 145 Fed. Rep. 662, 16 Am. B. R. 514.

[2] *In re* Ryburn, 145 Fed Rep. 662, 16 Am. B. R. 514.

[3] *In re* O'Connell (C. C. A. 1st Cir.), 137 Fed. Rep. 838, 14 Am. B. R. 237; *In re* Newton (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 6 Am. B. R. 52.

[4] B. A. 1898, Sec. 44; *In re* Newton (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 6 Am. B. R. 52; Fowler v. Jenks, 90 Minn. 74, 11 Am. B. R. 225.

[5] B. A. 1898, Sec. 70*a*.

as the original trustee. After a case has been reopened the administration of the newly acquired assets is made in the same way as if there had been no closing of the estate.

§ 272. The record of the referee to be transmitted to the court.

When the debts have been proved and allowed, the assets collected and distributed, the trustee's accounts audited and the trustee discharged, the case is concluded before the referee. He should then certify to a record of the proceedings before him, together with such papers as are on file before him, and transmit them to the clerk of the court.[1] They are preserved by the clerk as a part of the records of the court.

Certified copies of such proceedings or of such papers, when issued by the clerk or referee, are to be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now and may hereafter be admitted as evidence.[2] The referee can furnish certified copies only when the papers are in his possession, and not after his record has been filed with the clerk.

[1] B. A. 1898, Sec. 42*c*; Cook Inlet Coal Field Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475.

[2] B. A. 1898, Sec. 21*d*.

CHAPTER XXVI.

DISCHARGE.

§ 273. Application for a discharge.

Any person who has been adjudged a bankrupt may file an application for a discharge in the court of bankruptcy in which the proceedings are pending.[1] This includes involuntary as well as voluntary bankrupts. The insanity of a bankrupt does not affect his right to apply for a discharge.[2]

The application for a discharge should be by a petition in the prescribed form.[3] It should be entitled in the court and cause and addressed to the judge. It must state concisely, in accordance with the provisions of the bankrupt act and the orders of the court, the proceedings in the case and the acts of the bankrupt.[4] Thus it should state the name of the bankrupt, his residence and the date on which he was adjudged a bankrupt; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said acts and of the orders of the court touching his said bankruptcy. It should conclude with a prayer that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge. A person neeed not pray for a discharge from his firm debts in precise words, if he asks for a discharge from his provable debts; that virtually prays for a discharge from his partnership debts.[5] The petition should be dated and signed by the bankrupt. No verification is required.

As soon as the petition is properly filed the court passes an

[1] B. A. 1898, Sec. 14. Compare R. S. Sec. 5108 to Sec. 5120.

[2] *In re* Miller, 133 Fed. Rep. 1017, 13 Am. B. R. 345.

[3] Official Form No. 57; see Form No. 153, *post*.

[4] Gen. Ord. 31.

[5] *In re* Pierson, No. 11153 Fed. Cas., 10 N. B. R. 107.

order of notice.[6] This order should fix the date that a hearing may be had upon the petition, and provide that notice be published in a certain designated newspaper[7] to all known creditors and all other persons in interest to appear at the said time and place to show cause, if any they have, why the prayer of the petitioner should not be granted. The order should also provide that the clerk send by mail to all known creditors copies of the petition and the order. All creditors, wheher they have proved their claims or not, are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of the creditors, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of the hearing upon the application for discharge of the bankrupt.[8] If the creditors were not notified by mail it must appear that their addresses could not be obtained after due search, or the discharge will not be granted.[9] This order should be tested by the clerk and issued by him under the seal of the court. The clerk thereupon mails to each creditor and other party in interest a copy of the petition and the order and certifies that he has done so. This certificate of the clerk is sufficient evidence that the notices were duly mailed.[10]

A copy of the petition and order are also published in the newspaper, as directed by the order, and an affidavit to that effect, stating the days upon which they are so published, must be made and filed in the court. A copy of the printed advertisement is usually attached to the affidavit. The affidavit is regularly made by the publisher or some person officially connected with the newspaper. Any person cognizant of the fact may make it.

A bankrupt partner has been permitted to amend his petition

[6] Official Form No. 57; see Form No. 153, *post*.

[7] B. A. 1898, Sec. 28.

[8] B. A. 1898, Sec. 58*a*.

[9] *In re* Dvorak, 107 Fed. Rep. 76, 6 Am. B. R. 66.

[10] *In re* Townsend, No. 14116 Fed. Cas., 2 Ben. 62.

for discharge to release firm debts as well as his individual debts long after his discharge was granted.[11]

§ 274. When and where the petition is filed.

Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.[12] A petition filed more than twelve months and less than eighteen months after the adjudication will not be heard unless leave to file it has been granted by the court after hearing the reasons for delay,[13] and this leave will not be granted by a *nunc pro tunc* entry more than eighteen months after the adjudication.[14] If the court permits a petition to be filed after a year upon an insufficient showing the remedy is a motion to vacate.[15] The petition should be filed in the clerk's office and not with the referee,[16] or with the judge.[17]

It will be observed that the time within which an application may be made is not dependent at all upon the progress made in the administration of the estate. Assets may or may

[11] *In re* Kaufman, 136 Fed. Rep. 262, 14 Am. B. R. 393.

But see *In re* Hawk (C. C. A. 8th Cir.), 114 Fed. Rep. 916, 8 Am. B. R. 71, denying application to set aside a discharge to allow an amendment to insert a creditor in schedules.

[12] B. A. 1898, Sec. 14*a*; *In re* Fahy, 116 Fed. Rep. 239, 8 Am. B. R. 354.

[13] *In re* Knauer, 133 Fed. Rep. 805, 13 Am. B. R. 503; *In re* Lewin, 135 Fed. Rep. 252, 14 Am. B. R. 358; *In re* Anderson, 134 Fed. Rep. 319, 14 Am. B. R. 221.

[14] *In re* Wolff, 100 Fed. Rep. 430, 4 Am. B. R. 74.

[15] *In re* Haynes, 122 Fed. Rep. 560, 10 Am. B. R. 13.

[16] Watson v. McDuff (C. C. A. 5th Cir.), 101 Fed. Rep. 241, 4 Am. B. R. 110.

[17] *In re* Sykes, 106 Fed. Rep. 669, 6 Am. B. R. 264.

Under District Court rule 11 in bankruptcy in the Southern District of New York, which makes the office of the referee the office of the court, the filing of a petition for discharge with the referee is sufficient. *In re* Pincus, 147 Fed. Rep 621.

not have come into the hands of the trustee. The estate may have been fully or partly distributed. It is immaterial whether any dividend has been declared or not.

In computing the time within which a petition in bankruptcy must be filed the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[18] The word "holiday" includes Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[19]

A bankrupt is not entitled to file a second application for a discharge in the same proceeding when his first petition is denied after an investigation of its merits;[20] but the fact that a bankrupt has been refused a discharge does not prevent his obtaining one on again going through bankruptcy.[21] Since the amendment of Feb. 5, 1903, he can not obtain a discharge, when he has been granted one in a voluntary proceeding within six years.[22]

§ 275. Who may oppose a discharge.

An application for a discharge may be oposed by any of the "parties in interest."[1] To entitle a party to oppose a discharge he must have a pecuniary interest in the matter, and that interest must be satisfactorily shown.[2]

[18] B. A. 1898, Sec. 31.

[19] B. A. 1898, Sec. 1, clause 14.

[20] *In re* Brockway, 23 Fed. Rep. 583, reviewing 12 Fed. Rep. 69; *In re* Feigenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Royal, 113 Fed. Rep. 140, 7 Am. B. R. 636.

[21] *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; *In re* Herrman, 134 Fed. Rep. 566, 4 Am. B. R. 139. The discharge was denied on another ground later (C. C. A. 2d Cir.), 136 Fed. Rep. 767, 13 Am. B. R. 778.

[22] See Sec 280*c*, *post*.

[1] B. A. 1898, Sec. 14*b*.

[2] *In re* Servis, 140 Fed. Rep. 222, 15 Am. B. R. 271; *In re* Chandler (C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; *In re* Shepard, No. 12753 Fed. Cas., 1 N. B. R. 439; *In re* Smith, No. 12077 Fed. Cas., 8 Blatch. 461; *In re*

A person has been held to have an interest sufficient to entitle him to oppose a discharge, where his claim was contingent and unliquidated so as not to be capable of being proved as a debt,[3] or where he held an equitable claim only against the estate,[4] or where his claim was being contested,[5] although his claim has not been proved [6] or is no longer provable,[7] or where he is plaintiff in a suit against the bankrupt for contribution on a joint debt which he has paid.[8] The reason that such persons are parties in interest is that if a discharge is granted, the bankrupt may plead it in bar of their claims if asserted later. A creditor whose only debt is one not released by discharge,[9] or whose debt is barred by the statute of limitations,[10] or who has been paid in full,[11] has no such interest and therefore can not oppose the discharge.

A trustee has been permitted to file objections to the granting of a discharge to the bankrupt whose estate he is administering.[12] The executor or administrator of a deceased creditor of the bankrupt may oppose his discharge.

It has been held that where a partnership which had proved a claim against a bankrupt estate was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, no one could thereafter maintain objections to the bankrupt's discharge without showing affirmatively that all assented to the action.[13]

A creditor may be barred from objecting to a discharge by

Boutelle, No. 1705 Fed. Cas., 2 N. B. R. 129; *In re* Murdock, No. 9939 Fed. Cas., 1 Low. 362; Book's Case, No. 1637 Fed. Cas., 3 McLean, 317.

[3] *Ex parte* Traphagen, No. 14140 Fed. Cas., 1 N. Y. Leg. Obs. 98.

[4] *In re* Tebbetts, No. 13817 Fed. Cas., 5 Law. Rep. 259.

[5] *In re* Belden, No. 1238 Fed. Cas., 4 Ben. 225.

[6] *In re* Frice, 96 Fed. Rep. 611, 2 Am. B. R. 674.

[7] *In re* Bimberg, 121 Fed. Rep. 942, 9 Am. B. R. 601.

[8] *In re* Conroy, 134 Fed. Rep. 764, 14 Am. B. R. 249.

[9] *In re* Servis, 140 Fed. Rep. 222, 15 Am. B. R. 271. See also *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

[10] *In re* Burk, No. 2156 Fed. Cas., Deady, 425.

[11] *In re* Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

[12] *In re* Levey, 133 Fed. Rep. 572, 13 Am. B. R. 312.

[13] *In re* Hendrick, 143 Fed. Rep. 647, 16 Am. B. R. 218.

laches,[14] or he may be estopped by his own consent to an act from alleging it against his debtor on the question of his discharge. The question of estoppel arose more frequently under the act of 1867, where fraudulent preferences barred a discharge, that it can under the present act. The question was frequently considered by the court under the former act.[15]

§ 276 How to oppose a discharge.

Although a petition for a discharge is filed and the opposition to it is made in the bankruptcy proceedings, the specification of grounds in opposition to the discharge is in the nature of a new suit. It calls for pleas, proofs and a hearing or trial.[1] If, however, the bankrupt does not plead to the specifications the bankrupt will not be denied a discharge without proof by the opposing creditor.[2]

A creditor or other party in interest, who desires to oppose a discharge is required to enter his appearance in opposition thereto on the day when the creditors are required to show cause, and to file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.[3] This should be filed with the clerk and not with the referee or sent to the judge.[4]

[14] Kentucky National Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

[15] *In re* Sawyer, No 12394 Fed. Cas., 2 Hask. 337; *In re* Schuyler, No. 12494 Fed. Cas., 2 Ben. 200; *In re* Kraft, 3 Fed. Rep. 892; Johnson v. Rogers, No. 7408 Fed. Cas., 15 N. B. R. 1; Judson v. The Courier Co., 8 Fed. Rep. 422.

[1] B. A. 1898, Sec. 14. *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795.

In *In re* Prager & Son, 134 Fed. Rep. 1006, 13 Am. B. R. 527, the court says: "The opposition to the discharge is always in the nature of a new suit. It requires proofs of the grounds set out in the specifications in opposition to the discharge."

[2] *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; *In re* Logan, 102 Fed. Rep. 876, 4 Am. B. R. 525; *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795.

[3] Gen. Ord. 32. *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Grant, 135 Fed. Rep. 889, 14 Am. B. R. 398.

[4] Watson v. McDuff (C. C. A. 5th Cir.), 101 Fed. Rep. 241, 4 Am. B. R. 410; *In re* Sykes, 106 Fed. Rep. 669, 6 Am. B. R. 264.

An appearance is not regularly entered until after a petition for discharge is filed,[5] but it has been held that an appearance may be entered to oppose a discharge at any time before the expiration of the time limited by general order 32.[6] The former is the better practice. Manifestly a person should not put in a defense until it is called for, and it is not called for until a petition is filed. Before that time it is not known whether the bankrupt will apply for a discharge or not.

A creditor intending to oppose an application for discharge may enter his appearance in person in his own behalf or by attorney, who must be an attorney or counselor authorized to practice in the circuit or district court.[7] The name of the attorney or counselor, with his place of business, must be entered upon the docket, with the date of the entry.[7] An appearance not duly authorized will be disregarded.[8] Unless an appearance is duly entered, the creditor has no standing in court as to the petition for discharge, and therefore can not be heard in opposition to it.[9] It has been held that creditors may enter their appearance upon an adjourned day of the hearing on the order to show cause;[10] and also that the court may, in its discretion, enlarge the time for entering appearance and filing specifications in opposition to a discharge as well after as before the expiration of the time allowed by the rule.[11] Speaking of this question, Judge Lowell said: "I

[5] *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; *In re* Seabury, No. 12573 Fed. Cas., 10 N. B. R. 90.

[6] *In re* Baum, No. 1116 Fed. Cas., 1 Ben. 274.

[7] Gen. Ord. 4; Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579; *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257.

[8] *In re* Eidom, No. 4314 Fed. Cas., 3 N. B. R. 106; Creditors v. Williams, 8279 Fed. Cas., 4 N. B. R. 579.

[9] *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; *In re* Sutherland, No. 13640 Fed. Cas., Deady, 573; *In re* Smith, No. 12985 Fed. Cas., 5 N. B. R. 20; Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579; *In re* Buxbaum, No. 2259 Fed. Cas., 2 Hughes, 339.

[10] *In re* Seabury, No. 12573 Fed. Cas., 10 N. B. R. 90; *In re* Tallmann, No. 13740 Fed. Cas., 2 Ben. 404.

But see *In re* Houghton, No. 6730 Fed. Cas., 2 Low. 328.

[11] *In re* Levin, No. 8291 Fed. Cas., 7 Biss. 231; *In re* Filley, 2 Cent. L. J. 419. In this last case it appeared that the creditor had not re-

have decided in one case that the discretion of the court to enlarge the time extends to the time for appearance, as well as to that for filing the specification, and may be exercised after the time has expired, as well as before; but I do not think it can be laid down as a matter of law that the day when creditors are required to show cause means any day to which the proceedings may have been adjourned for other purposes. But I do think the that rule intends that the court shall have power to enlarge the time whenever there is good cause shown for it. The distinction is between an absolute right imposing a corresponding duty upon the court, and a discretionary power to be exercised only upon cause shown." [12]

Upon the entry of appearance of a creditor or a party in interest to oppose a discharge all proceedings upon the petition are suspended until the specification of grounds in opposition to the discharge is filed.[13] Where no entry of appearance is made within the time specified, or where it is not duly authorized, it should be disregarded and the cause should proceed as if no opposition had been made.

Where there is no entry of appearance by an opposing party the petition of a bankrupt to be discharged may be continued from time to time to suit the convenience of the bankrupt.[14] When an appearance has been entered by any creditor against the discharge the proceedings upon the petition are no longer under the exclusive control of the bankrupt, but the opposing creditor can not move to dismiss the petition or that its prayer be denied because the bankrupt is, or supposed to be, dilatory in bringing the matter on for hearing. The proper course for the creditor is to move the court to set down the matter for hearing upon the petition and his objections there-

ceived notice of the application for discharge.

But see Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579; *In re* Houghton, No. 6730 Fed. Cas., 2 Low. 328.

[12] *In re* Houghton, No. 6730 Fed. Cas., 2 Low. 328.

See also *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Grant, 135 Fed. Rep. 889, 14 Am. B. R. 398.

[13] *In re* Frizelle, No. 5132 Fed. Cas., 5 N. B. R. 119.

to, if any be filed.[14] A hearing on a petition for discharge may be continued for the purpose of examining the bankrupt.[15]

§ 277. The specification of grounds in opposition to a discharge.

Where an opposing creditor or other party in interest has entered his appearance in opposition to a discharge upon the day when creditors are required to show cause, he must file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.[1] If the specification is not filed within the prescribed time it can not be considered.[2] Where a creditor has duly entered his appearance, and through inadvertence fails to file a specification within the prescribed time, he may, on showing proper cause, be allowed to file it *nunc pro tunc*.[3] Where the specification is not filed within the time, and the time for filing it is not extended, the cause progresses as though there were no opposition.[4]

The specification must be in writing.[5] It must state the name of the opposing creditor.[6] It should show that the person objecting is a party in interest. The statement that he is a creditor whose debt will be released by a discharge is sufficient. The mere statement that he is trustee of the estate is not sufficient.[7]

The specificaion should then state the grounds of opposition

[14] *In re* Sutherland, No. 13640 Fed. Cas., Deady, 573.

[15] *In re* Seckendorf, No. 12600 Fed. Cas., 2 Ben. 462; *In re* Thompson, No. 13935 Fed. Cas., 2 Ben. 166; *In re* Jacobs, No. 7160 Fed. Cas., 5 Saw. 458.

[1] Gen. Ord. 32.

[2] *In re* Albrecht, 104 Fed. Rep. 974, 5 Am. B. R. 223; *In re* Clothier, 108 Fed. Rep. 199, 6 Am. B. R. 203; *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257.

[3] *In re* Grefe, No. 5794 Fed. Cas., 2 N. B. R. 329.

[4] *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257; Creditors v. Williams, No. 3379 Fed. Cas., 4 N. B. R. 579.

[5] Gen. Ord. 32.

[6] Official Form No. 58; see Form No. 157, *post; In re* Shoemaker, No. 12799 Fed. Cas., 4 Biss. 245, it was held that "A. and B., attorneys for opposing creditors," was not sufficient. *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391.

[7] *In re* Levey, 133 Fed. Rep. 572, 13 Am. B. R. 312.

specifically. The object of the specification of grounds of opposition to a petition for discharge is to give the bankrupt reasonable notice of what is expected to be proved against him and to advise the court of the issue to be tried. The allegations must be averments of fact and not conclusions of law.[8]

Where the ground of objection is the commission of an offense or crime under the act, it is insufficient to charge the offense in the words of the statute, but the specification must state facts showing the commission of the offense or crime with substantially the same particularity and exactness required in a criminal information or an indictment.[9] The acts set out must be charged to have been "knowingly and fraudulently" done.[10] Where the ground of objection is the concealment of property the specification must describe the property, name the person holding the title, state the time of transfer and other facts necessary to identify the transaction.[11] Where the ground of objection is the making of a false oath, the account or the testimony alleged to be false must be specifically pointed out together with the facts relied upon to prove its falsity.[12] Where the ground of objection is that the bankrupt failed to keep books of account, etc., a charge in the language

[8] *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Servis, 140 Fed. Rep. 222, 15 Am. B. R. 271; *In re* Chandler (C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548.

[9] *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242.

[10] *In re* Patterson, 121 Fed. Rep. 921, 10 Am. B. R. 371; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554; *In re* Adams, 104 Fed. Rep. 72, 4 Am. B. R. 696.

[11] *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; *In re* Milgraum & Ost, 129 Fed. Rep. 827, 12 Am. B. R. 306; *In re* Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244.

[12] *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493.

of the act is all that is required.[13] When it is alleged that the bankrupt has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, not only must the false representation be set out, but the name of the person so alleged to have been defrauded must be given.[14]

The specification must be signed by the party in interest who is opposing the discharge.[15] It must be verified by affidavit of the party in interest,[16] or his agent or attorney who has knowledge of the facts stated in the petition.[17] An affidavit on information and belief has been held sufficient.[18] But it is better to have the affidavit positive in its terms.[19] A defect in verifying a petition may be cured by amendment [20] or if no exception is taken it will be considered waived.[21]

Where the allegations are so general as really not to advise the bankrupt what facts he must be prepared to meet and resist, the specification is bad, and may be disregarded [22] or

[13] *In re* Ginsburg, 130 Fed. Rep. 627, 12 Am. B. R. 459; *In re* Patterson, 121 Fed. Rep. 921, 10 Am. B. R. 371; *In re* Levey, 133 Fed. Rep. 572, 576, 13 Am. B. R. 312; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

[14] Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

[15] Official Form No. 58; see Form No. 157, *post*. *In re* Glass, 119 Fed. Rep. 509, 520, 9 Am. B. R. 391, 405.

[16] *In re* Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 7 Am. B. R. 252; *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Meurer, 144 Fed. Rep. 445, 15 Am. B. R. 823; *In re* Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244.

But see *In re* Jamieson, 120 Fed. Rep. 697, 9 Am. B. R. 681.

[17] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Milgraum & Ost, 129 Fed. Rep. 827, 12 Am. B. R. 306.

But see *In re* Glass, 119 Fed. Rep. 520, 9 Am. B. R. 391.

[18] *In re* Milgraum & Ost, 129 Fed. Rep. 827, 12 Am. B. R. 306.

[19] *In re* Glass, 119 Fed. Rep. 520, 9 Am. B. R. 391; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Brown (C. C. A. 5th Cir), 112 Fed. Rep. 49, 7 Am. B. R. 252.

[20] *In re* Meurer, 144 Fed. Rep. 445, 15 Am. B. R. 823.

[21] *In re* Robinson, 123 Fed. Rep. 844, 10 Am. B. R. 477; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

[22] *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795; *In re* Rathbone, No. 11580 Fed. Cas., 2 Ben.

stricken out.[23] All objections to specifications for formal defects must be raised before the issue is tried or the defect is waived.[24] If the specifications are defective either in form or in substance they may be amended by leave of the court.[25] Whether or not this leave shall be granted is within the discretion of the court and the question of whether or not this discretion was abused is one on which the circuit court of appeals can exercise its power of revision under Section 24*b*.[26] Before the hearing the court should be very liberal in granting leave to amend specifications,[27] but after issue joined and the case is argued amendment will not be allowed.[28] In one case amendment was allowed after the evidence was in where it would not present any new issue.[29] In amending specifications the objectors will not be permitted to change the substantial nature of their objections after the time allowed for filing objections.[30]

138; *In re* Hansen, No. 6039 Fed. Cas., 2 N. B. R. 211; *In re* Dreyer, No. 4082 Fed. Cas., 2 N. B. R. 212; *In re* Son, No. 13174 Fed. Cas., 2 Ben. 153; *In re* Tyrrel, No. 14314 Fed. Cas., 2 N. B. R. 200.

[23] *In re* Waggoner, No. 17037 Fed. Cas., 1 Ben. 532.

[24] *In re* Baldwin, 119 Fed. Rep. 796, 9 Am. B. R. 591; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Robinson, 123 Fed. Rep. 844, 10 Am. B. R. 477; *In re* Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327. In the northern district of New York this should be done by motion. *In re* Baldwin, *supra*.

[25] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Parish,, 122 Fed. Rep. 553, 10 Am. B. R. 548.

[26] *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; *In re* Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 12 Am. B. R. 252.

[27] *In re* Glass, 119 Fed. Rep. 509, 9 Am. B. R. 391; *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767; *In re* Frice, 96 Fed. Rep. 611, 2 Am. B. R. 674; *In re* Hirsch, 96 Fed. Rep. 468, 471, 2 Am. B. R. 715, 718; *In re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 610; *In re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600.

Amendment was not allowed in *In re* Mudd, 105 Fed. Rep. 348, 5 Am. B. R. 242; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747.

[28] *In re* Smith, 16 Fed. Rep. 465, 467; *In re* Graves, 24 Fed. Rep. 550.

[29] *In re* Pierce, 103 Fed. Rep. 64, 4 Am. B. R. 554.

[30] *In re* Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244; *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795; *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. R. 747; *In re* Mercur (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 10 Am. B. R. 505, affirm-

The specification as amended should only amount to an enlargement of the original.

As the proceedings in bankruptcy are strictly statutory, a discharge can be refused only upon a ground specifically set forth in the statute, except the want of jurisdiction of the court to entertain the proceedings. The statutory grounds which may be set up in the specification in opposition to a petition for discharge are considered in the next few sections.

§ 278. Grounds for opposing a bankrupt's discharge.

In order to prevent a bankrupt's discharge his case must fall within one of the exceptions named in the statute.[1] Under the act of 1867 the cases in which no discharge could be granted were collated in ten separate paragraphs.[2] The bill, which afterwards became the present bankrupt act, contained nine distinct classes of cases in which no discharge could be granted.[3] These grounds remained in the bill until

ing 116 Fed. Rep. 655, 8 Am. B. R. 275.

[1] B. A. 1898, Sec. 14*b*; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* McCarty, 111 Fed. Rep. 151, 7 Am. B. R. 40; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Peacock, 101 Fed. Rep. 560, 4 Am. B. R. 136; *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548.

In re Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727; *In re* Walther, 95 Fed. Rep. 941, 2 Am. B. R. 702; and *In re* Fleishman, 120 Fed. Rep. 960, 9 Am. B. R. 557, seem to deny a discharge where the statute does not authorize it.

[2] R. S. Sec. 5110.

[3] The bill provided that the bankrupt should be discharged "unless he has (1) been convicted of having committed an offense punishable by imprisonment as herein provided; (2) given a preference as herein defined, and within six months prior to the filing of the petition against him, which has not been surrendered to the trustee; (3) obtained property upon credit which has not been paid for or stored at the time the petition is filed against him upon a materially false statement in writing made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person from whom he obtained such property on credit; (4) made a transfer of any of his property which any creditor who has proved his claim in the proceedings might, at the time of the filing of the petition, have impeached as fraudulent if he had then been a judgment creditor, unless such property shall have been sur-

its final revision by the conference committee. The bill was materially changed by the conference committee in this respect.[4] Many of the grounds were stricken out.

Before the amendment of February 5, 1903, there were two general grounds only for contesting the discharge of a bankrupt in the present statute. They were that the bankrupt has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true condition might be ascertained.[5]

The statute as it existed prior to February 5, 1903, applies to all cases in which the proceedings were begun before that time. By that amendment the second ground was changed to read "with intent to conceal his financial condition, destroyed concealed, or failed to keep books of account or records from which such condition might be ascertained," and the following grounds were added:[6]—obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such prop-

rendered to the trustee; or (5) with fraudulent intent and in contemplation of bankruptcy, destroyed or negected to keep books of account or records from which his true condition might be ascertained; or (6) made a substantially false valuation, as a bankrupt, of any of the property of his estate in his schedule of property, or intentionally omitted therefrom any of the property of his estate, or from the list of his creditors any person to whom he is indebted in a substantial amount, or included therein any person to whom he is not indebted, or included therein a creditor for an amount substantially more than the true indebtedness, of (7) secreted or conveyed any of his property to avoid its being administered in bankruptcy, or any document relating to his property in contemplation of bankruptcy; or (8) transferred any property otherwise than in the ordinary course of his business, in contemplation of bankruptcy; or (9) in case of any person having, to his knowledge, after he has become a bankrupt, proved a false claim against his estate, failed to disclose that fact, within one month after coming to a knowledge thereof, to his trustee."

[4] 31 Cong. Rec. 7205.

[5] B. A. 1898, Sec. 14*b*. See Secs. 279 and 280, *post*.

[6] 32 Stat. at L. 797.

erty on credit;[7] or, at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors;[8] or, in voluntary proceedings been granted a discharge in bankruptcy within six years;[9] or in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.[10]

Another ground for contesting a discharge, recognized by the courts, is that the court has never acquired jurisdiction of the proceedings, although it may have made many orders therein. Thus a court will not acquire jurisdiction where at the time of filing the petition the bankrupt had not resided or had a domicile or a place of business within the district for the length of time prescribed by the statute, or where any jurisdictional requirement is wanting. This objection can not be raised upon an application for a discharge when the record on its face shows jurisdiction.[11] The truth of jurisdictional averments in the petition must be contested at the time of the adjudication or jurisdiction will be conclusively presumed and a discharge granted.[11]

§ 279. First ground for opposing a discharge, that the bankrupt is guilty of an offense.

The court will refuse the application for a discharge when the bankrupt has committed an offense under the statute punishable by imprisonment.[0]

Offenses under the act are: When a person has knowingly and fraudulently, *first*, concealed, while a bankrupt, from his trustee any of the property belonging to his estate

[7] See Sec. 280*a*, *post*; *In re* Ives, No. 7115 Fed. Cas., 5 Dill. 146; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Clisdell, 101 Fed. Rep. 246, 4 Am. B. R. 95; *In re* Mason, 99 Fed. Rep. 256, 3 Am. B. R. 599.

[8] See Sec. 280*b*, *post*.

[9] See Sec. 280*c*, *post*.

[10] See Sec. 280*d*, *post*.

[11] See cases cited in note 7 above.

[0] B. A. 1898, Sec. 14*b*.

in bankruptcy; or, *second,* made a false oath or account in, or in relation to, any proceeding in bankruptcy; or, *third,* presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition, personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or, fourth, received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the act; or, *fifth,* extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.[1] What acts are necessary to constitute each of these offenses is considered elsewhere and need not be repeated here.[2]

It is not necessary that a bankrupt shall have been convicted of the offense as a foundation for refusing the discharge. If he has been guilty of an offense he can not be discharged, although from difficulties in proof, placed in the way by statute, he can not be convicted of the offense in a criminal prosecution.[3]

The burden of proof is on the objecting creditor to establish by clear and convincing evidence that the bankrupt has committed the offense under the act in order to defeat his discharge.[4] The proceeding for a discharge is not a criminal proceeding.[5] While the objecting party has the burden of the proof, he is not required to prove the commission of the offense alleged beyond a reasonable doubt, a fair preponder-

[1] B. A. 1898, Sec. 29*b*. See also Offenses, Chap. XXI, *ante*.

[2] Secs. 230 to 234, *ante*.

[3] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dow's Estate, 105 Fed. Rep. 889, 5 Am. B. R. 400; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; *contra In re* Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521.

[4] *In re* Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191; *In re* Jacobs, 144 Fed. Rep. 868, 16 Am. B. R. 482.

[5] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527.

ance of evidence is sufficient.[6] Testimony of the bankrupt upon his examination may be used upon an application to defeat a discharge.[7]

§280. Second ground of opposing discharge, that bankrupt destroyed, concealed or failed to keep books.

A bankrupt should not be granted a discharge in proceedings begun since February 5, 1903, when he has, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained.[1]

In order to prevent a discharge under this provision two things must concur. *First,* the bankrupt must have destroyed, concealed, or failed to have kept books of account or records from which his financial condition might be ascertained. *Second,* he must have done this with intent to conceal his financial condition.

The original bankrupt act contained the word "fraudulent" before intent and also a third element, namely: that he must have destroyed or concealed or failed to keep books of account in contemplation of bankruptcy.[2] The words "in contemplation of bankruptcy" did not mean "in contemplation of insolvency"—or a simple inability to pay as debts should

[6] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Leslie, 119 Fed. Rep. 406, 9 Am. B. R. 561; *In re* Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527; *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; *In re* Howden, 111 Fed. Rep. 723, 7 Am. B. R. 191.

[7] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Wiesen Bros., 135 Fed. Rep. 442, 14 Am. B. R. 347; *In re* Alphin & Lake Cotton Co., 131 Fed. Rep. 824, 12 Am. B. R. 653.

[1] B. A. 1898, Sec. 14*b*, clause 2, as amended February 5, 1903, 32 Stat. at L. 797.

[2] B. A. 1898, Sec. 14*b*. Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24; *In re* Idzall, 96 Fed. Rep. 314, 2 Am. B. R. 741; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Blalock, 118 Fed. Rep. 679, 9 Am. B. R. 266; *In re* Spear, 103 Fed. Rep. 779, 4 Am. B. R. 617; *In re* Brice, 102 Fed. Rep. 114, 4 Am. B. R. 355.

become due and payable—but meant that the debtor must contemplate the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself to be declared a bankrupt.[3]

It is not necessary to allege or prove, in proceedings begun since the amendment of February 5, 1903, that the intent was fraudulent or that the destruction, concealment or failure to keep books was in contemplation of bankruptcy in order to defeat a discharge.[4] It is necessary to allege and prove these things when the bankruptcy proceeding was begun before that time.[5]

First, Failure to Keep Books, etc.—It is essential to prevent a discharge that the bankrupt has destroyed, concealed or failed to have kept books of account or records from which his financial condition might be ascertained.[6]

The absence of books of account and records must be due to the acts of the bankrupt. He will not be required to abide the consequences of the acts of other persons, if innocent himself. The mere fact that such books do not come into the possession of the trustee is not sufficient to prevent a discharge,[7] unless the bankrupt is chargeable for their disappearance.[8] A failure to keep books by a husband who manages the business for his wife will not prevent a discharge

[3] Buckingham v. McLean, 13 How. 168, 14 L. Ed. 91; *In re* Marx, 102 Fed. Rep. 676, 4 Am. B. R. 521; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24.

[4] *In re* Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264.

[5] Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24; *In re* Mackenzie, 132 Fed. Rep. 114, 12 Am. B. R. 605; *In re* Studebaker (C. C. A. 2d Cir.), 127 Fed. Rep. 951, 11 Am. B. R. 384; *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160.

[6] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[7] *In re* Eades (C. C. A. 7th Cir.), 143 Fed. Rep. 293, 16 Am. B. R. 30.

[8] Ablowich v. Stursberg (C. C. A. 2d Cir.), 105 Fed. Rep. 751, 5 Am. B. R. 403, affirming 3 Am. B. R. 586; *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; *In re* Morgan, 101 Fed. Rep. 982, 4 Am. B. R. 402.

being granted the wife, if she is innocent.[9] A failure to keep books by a partner, if it prevents the discharge of an innocent partner at all, it is so only when the transactions not recorded had reference to partnership transactions so as to fall within the scope of the partners authority.[10] The destruction of partnership books is ground for the refusal of a discharge to a bankrupt partner individually[11]

A discharge should be denied a bankrupt, who has kept proper books of account in his business to show his financial condition at the time of the bankruptcy, and prevents their use in the settlement of his estate by destroying [12] or concealing [13] them. To conceal includes to secrete, falsify and mutilate.[14] The mere fact that a bankrupt fails to preserve books of account kept in his business, from which he had retired many years before bankruptcy, is not sufficient to defeat his discharge.[15]

A discharge should be denied a bankrupt, who has kept books of account or records in his business. This may result from a failure to keep proper books or from the manner in which the books are kept. The object of keeping the books is to furnish and preserve evidence of the real condition of the bankrupt's affairs, so that all of the bankrupt's proper assets

[9] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4; *In re* Hyman, 97 Fed. Rep. 195, 3 Am. B. R. 169.

[10] *In re* Schultz, 109 Fed. Rep. 264, 6 Am. B. R. 91. Consult also *In re* Hardie & Co., 143 Fed. Rep. 607, 609, 16 Am. B. R. 313.

[11] *In re* Conley, 120 Fed. Rep. 42, 9 Am. B. R. 496.

[12] Ablowich v. Stursberg (C. C. A. 2d Cir.), 105 Fed. Rep. 751, 5 Am. B. R. 403, affirming 3 Am. B. R. 586; *In re* McBachron, 116 Fed. Rep. 783, 8 Am. B. R. 732.

But see *In re* Studebaker (C. C. A. 2d Cir.), 127 Fed. Rep. 951, 11 Am. B. R. 384.

[13] *In re* McBachron, 116 Fed. Rep. 783, 8 Am. B. R. 732; *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103; *In re* Jewett, 3 Fed. Rep. 503; *In re* Carrier, 47 Fed. Rep. 438.

[14] B. A. 1898, Sec. 1, clause 22. See also *In re* Mendelsohn, 102 Fed. Rep. 119, 4 Am. B. R. 103, and *In re* Pierson, No. 11153 Fed. Cas., 10 N. B. R. 107. *In re* Bemis, 104 Fed. Rep. 672, 5 Am. B. R. 36; Bauman v. Feist (C. C. A. 8th Cir.), 107 Fed. Rep. 83, 5 Am. B. R. 703.

[15] *In re* Prager & Son, 134 Fed Rep. 1006, 13 Am. B. R. 527; *In re* Stark, 96 Fed. Rep. 88, 2 Am. B. R. 785.

and liabilities may be ascertained and his property distributed among his *bona fide* creditors. A bankrupt is required to have kept such books as are necessary to ascertain his financial condition. What books are necessary for this purpose depends upon the character of the business and the circumstances in each particular case.[16] If the business of the bankrupt is such that ordinarily books would not be kept, he need not have kept them.[17]

There may be a failure to keep books, if the books are so irregularly kept that it is impossible to determine the bankrupt's financial condition from them.[18] Congress has not attempted to prescribe any particular system or principle of bookkeeping. The form and manner in which the books are kept is unimportant, so long as the financial condition of the bankrupt may be ascertained from them.[19] If a competent person upon an examination of the books and records kept by the bankrupt is able to reach a substantially correct conclusion as to the state of his affairs, it is all that is required. If he can not do this there has not been the keeping of "books of account or record," which the bankrupt act calls for.

[16] *In re* Bemus, 104 Fed. Rep. 672, 5 Am. B. R. 36; *In re* Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re* Kenyon, 112 Fed. Rep. 658, 7 Am. B. R. 527; *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160.

See also *In re* Bellis, No. 1275 Fed. Cas., 4 Ben. 53; *In re* Gay, No. 5279 Fed. Cas., 2 N. B. R. 358; *In re* Smith, 16 Fed. Rep. 468; *In re* White, No. 17532 Fed. Cas., 2 N. B. R. 590; *In re* Brockway, 12 Fed. Rep. 69; *In re* Hammond, No. 5999 Fed. Cas., 1 Low. 381; *In re* Vernia, 5 Fed. Rep. 723.

[17] *In re* Corn, 106 Fed. Rep. 143, 5 Am. B. R. 478; *In re* Prager & Son, 134 Fed. Rep. 1006, 13 Am. B. R. 527; *In re* Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; Sellers v. Bell (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 2 Am. B. R. 529.

[18] *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed .Rep. 259, 8 Am. B. R. 160; *In re* Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264; *In re* Greenberg, 114 Fed. Rep. 773, 8 Am. B. R. 94; *In re* Cashman, 103 Fed. Rep. 67, 4 Am. B. R. 326; *In re* Morgan, 101 Fed. Rep. 982, 4 Am B. R. 402; *In re* Allendorf, 129 Fed Rep. 981, 12 Am. B. R. 320; *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333.

[19] *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; *In re* Izdall, 96 Fed. Rep. 314, 2 Am. B. R. 741.

SECOND, INTENT.—In order to defeat a discharge there must be an intent on the part of the bankrupt to conceal his financial condition, where he has destroyed, concealed or failed to keep books.[20] In bankruptcy proceedings begun prior to the amendment of 1903, the intent must be fraudulent.[21] By omitting the word "fraudulent" the amendment of 1903 has enlarged the rights of the creditors. It is not necessary now to allege or prove fraud. An intent to conceal his financial condition is all that the creditors opposing the discharge of a bankrupt are required to establish.[22] Where the bankrupt acts honestly without intent to cover up his financial condition, he is entitled to a discharge, although he may have destroyed or neglected to keep books through inadvertence, ignorance or mistake. Under the act of 1867 a simple failure of merchants and tradesmen to keep books of account, irrespective of intent, was all that was necessary to defeat a discharge.[23]

The intent of the bankrupt can not ordinarily be proved by direct evidence. The bankrupt is presumed to intend the direct natural consequences of his acts. If the result is to produce inexplicable confusion of the bankrupt's financial affairs, the bankrupt must be held to have intended to conceal his financial condition.[24]

The burden of proof is upon the opposing creditors to establish by clear and convincing evidence that the bankrupt has destroyed, concealed or failed to keep books of record or

[20] B. A. 1898, Sec. 14*b*, as amended February 5, 1903, 32 Stat. at L. 797. *In re* Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320; Godshalk v. Sterling (C. C. A. 2d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302; *In re* Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333.

[21] B. A. 1898, Sec. 14*b*. *In re* Studebaker (C. C. A. 2d Cir.), 127 Fed. Rep. 951, 11 Am. B. R. 384; Van Ingen v. Schophofen (C. C. A. 8th Cir.), 129 Fed. Rep. 352, 12 Am. B. R. 24; *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160; *In re* Izdall, 96 Fed. Rep. 314, 2 Am. B. R. 741.

[22] *In re* Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264; Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302.

[23] R. S. Sec. 5110, clause 7; *In re* Hunt, 26 Fed. Rep. 739.

[24] *In re* Alvord, 135 Fed. Rep. 236, 14 Am. B. R. 264.

account with the intent to conceal his financial condition.[25] It has been held that evidence of a failure to keep any books whatever will not support an allegation complaining of the manner in which the books were kept so as to prevent a discharge.[26] In such a case the court on application will ordinarily allow the pleadings to be amended to conform to the evidence.

§ 280a. Third ground of opposing discharge, that the bankrupt has obtained property on credit upon a false statement in writing.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when he has obtained property on credit from any person, upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit.[1]

This bar to a discharge was added by the amendment of Februry 5, 1903. Nothing like it is contained in any prior bankruptcy laws of this country. It applies only to proceedings begun since the date of the amendment.

To prevent a discharge under this provision, two things must be established by the objecting creditor: *first*, the bankrupt must have obtained property on credit, and, *second*, he must have made to the person from whom he obtained it a materially false statement in writing for the purpose of obtaining it on credit.

The statement referred to in this provision must be made by the bankrupt or his agent with his authority[2] to the creditor giving him credit. It need not be made to the creditor opposing the discharge.[3] It has been held sufficient to bar his

[25] *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; *In re* Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290; *In re* Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95; *In re* Eades (C. C. A. 7th Cir.), 143 Fed. Rep. 292, 16 Am. B. R. 30.

[26] *In re* Halsell, 132 Fed. Rep. 562, 13 Am. B. R. 106.

[1] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797; *In re* Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327.

[2] *In re* Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380.

[3] *In re* Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

discharge if the false statement was made to a creditor whose debt was paid in full before bankruptcy.[4] A false statement made by one partner upon which credit was extended to the firm has been held sufficient to defeat the discharge of another partner.[5] A false statement made by a bankrupt may bar his right to a discharge although the credit was obtained by a corporation of which the bankrupt owned the majority of the stock.[6]

An oral statement is not sufficient. It must be in writing, but there is nothing in the act which requires it to be signed by the debtor. The statement must be materially false in fact. It is not necessary that it should be intentionally false.[7] If the statement is made for the purpose of obtaining property on credit, is false and was relied upon by the creditor upon the faith of which he made the sale on credit, it is sufficient to defeat a discharge.[8] If the creditor does not give credit on the faith of the statement,[9] or if the debtor did not make the statement for the purpose of obtaining the property on credit,[10] it will not bar a discharge, no matter how false the statement may be.

There is no time limit fixed by the statute within which the statement must be made.[11] It may be made more than four months prior to filing the petition and defeat a discharge.[12]

This ground may be pleaded by the creditor selling the goods or any other person entitled to oppose the discharge.[13] In pleading this objection the specification should set out the

[4] *In re* Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

[5] *In re* Hardie & Co., 143 Fed. Rep. 607, 16 Am. B. R. 313.

[6] *In re* Dresser & Co., 144 Fed. Rep. 318, 13 Am. B. R. 616.

[7] *In re* Petersen, 10 Am. B. R. 355.

[8] *In re* Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380.

[9] *In re* Kaplan, 141 Fed. Rep. 463, 15 Am. B. R. 534; *In re* Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320.

[10] *In re* Allendorf, 129 Fed. Rep. 981, 12 Am. B. R. 320.

[11] *In re* Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327; *In re* Peterson, 10 Am. B. R. 355; *In re* Dresser & Co., 144 Fed. Rep. 318, 13 Am. B. R. 616.

[12] *In re* Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327.

[13] *In re* Harr, 143 Fed. Rep. 421, 16 Am. B. R. 213.

false representations and give the names of persons alleged to have been defrauded.[14] The burden of proof, as in other objections to a discharge, is upon the objecting creditors.[15]

§ 280b. Fourth ground of opposing discharge, that the bankrupt has made a fraudulent transfer.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when he has, at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed, or permitted to be removed, destroyed or concealed, any of his property with intent to hinder, delay or defraud his creditors.[1]

This bar to a discharge was added by the amendment of February 5, 1903, and applies only to proceedings instituted since that date.

This is substantially the phraseology used in the first act of bankruptcy. If the objecting creditor can show the commission of an act by the bankrupt after the first day of the four months' period, which would be an act of bankruptcy under Sec. 3*a*, clause 1, if committed prior to the filing of the petition, the bankrupt is not entitled to a discharge.[2] This provision makes conveyances which by the common law and the statute of Elizabeth were held void, because fraudulent, a ground for refusing a discharge to a bankrupt. A mere constructive fraud is not sufficient to defeat a discharge. The test is the presence or absence of real fraud.[3] An assign-

[14] Godshalk v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302; *In re* Levey, 133 Fed. Rep. 572, 13 Am. B. R. 312.

[15] *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333.

[1] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Miller, 135 Fed. Rep. 591, 14 Am. B. R. 329; *In re* Schenck, 116 Fed. Rep. 554, 8 Am. B. R. 727; *In re* Young, 140 Fed. Rep. 728, 15 Am. B. R. 477; *In re* Jacobs & Verstandig, 147 Fed. Rep. 797.

[2] As to what constitutes such act of bankruptcy, see Sec. 51, *ante*.

[3] *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204; *In re* Miller, 135 Fed. Rep. 591, 14 Am. B. R. 329; *In re* Gift, 130 Fed. Rep. 239, 12 Am. B. R. 244; *In re* Brown, 140 Fed. Rep. 383, 15 Am.

ment for the benefit of creditors is not in itself fraudulent,[4] and will not bar a discharge. A preference is not made a bar to a discharge.[5]

The property transferred or concealed must belong to the bankrupt to fall within this provision.[6] The words "with intent to hinder, delay and defraud creditors" mean for the purpose of defrauding the entire body of creditors and not the conversion of the property of one creditor. The fact that a stock broker transfers stock pledged with him will not bar his discharge.[7] Where the fraudulent transaction took place more than four months prior to filing the petition in bankruptcy, it will not prevent a discharge.[8]

Where a discharge is objected to on this ground the specification should describe the property claimed to be fraudulently transferred or concealed, giving the name of the person holding the title, the time of the transfer and any other fact necessary to identify the transaction.[9] The allegation may be amended for the purpose of amplifying the original averment where the substance is not changed by the amendment.[10] The burden of establishing this ground of opposition by clear and convincing proof is on the objecting creditor.

§ 280c. Fifth ground of opposing discharge, that the bankrupt was granted a discharge within six years.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when, in voluntary proceed-

B. R. 350; *In re* Dauchy (C. C. A. 2d Cir.), 122 Fed. Rep. 691, 11 Am. B. R. 527; *In re* Le Claire, 124 Fed. Rep. 655, 10 Am. B. R. 733. See also Lansing Boiler & Engine Works v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 11 Am. B. R. 558.

[4] Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed 1165, 10 Am. B. R. 1.

[5] *In re* Maher, 144 Fed. Rep. 505, 16 Am. B. R. 340.

[6] *In re* Berry & Co., 146 Fed. Rep. 623, 15 Am. B. R. 360; Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694.

[7] *In re* Berry & Co., 146 Fed. Rep. 623, 15 Am. B. R. 360.

[8] *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204.

[9] *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; *In re* Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244.

[10] *In re* Gift, 130 Fed. Rep. 230, 12 Am. B. R. 244.

ings he has been granted a discharge in bankruptcy within six years.[1]

This bar to a discharge was added by the amendment of February 5, 1903, and applies only to proceedings instituted since that date. It is not retroactive as applied to cases where the first proceedings were had prior to the amendment. It merely adds a new condition of discharge in cases instituted after the amendment.[2]

The bar is limited to discharges actually granted in voluntary proceedings.[3] A discharge granted in a partnership proceeding instituted by himself is one granted in voluntary proceedings.[4] When a discharge has been granted in a voluntary proceeding, it operates as a bar to a discharge being granted within the prescribed period in a subsequent proceeding, either voluntary or involuntary.[5] It is no bar to a discharge that a discharge was applied for and was not granted in a former voluntary proceeding, or that a discharge was either granted or denied in a former involuntary proceeding. A voluntary proceeding in bankruptcy for the sole purpose of obtaining a discharge which a prior involuntary proceeding has conclusively determined that the bankrupt is not lawfully entitled to presents no ground for relief and should be dismissed.[6] If new debts have been created since the first proceeding a different case is presented. The bankrupt may be entitled to a discharge releasing him from these debts. A discharge in a second proceeding will not have the effect of

[1] B. A. 1898, Sec. 14*b* as amended Feb. 5, 1903, 32 Stat. at L. 797.

[2] *In re* Carleton, 131 Fed. Rep. 146, 12 Am. B. R. 475; *In re* Seaholm (C C. A. 1st Cir.), 136 Fed. Rep. 144, 14 Am. B. R. 292.

[3] *In re* Seaholm (C. C. A. 1st Cir.), 136 Fed. Rep. 144, 14 Am. B. R. 292; *In re* Neely, 134 Fed. Rep. 667, 12 Am. B. R. 407.

[4] *In re* Carleton, 131 Fed. Rep. 146, 12 Am. B. R. 475.

[5] *In re* Neely, 134 Fed. Rep. 667, 12 Am. B. R. 407; *In re* Carleton, 131 Fed. Rep. 146, 12 Am. B. R. 475.

[6] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Kuffler, 144 Fed. Rep. 445, 16 Am. B. R. 305; *In re* Weintrab, 133 Fed. Rep. 1000, 13 Am. B. R. 711.

releasing debts from which the bankrupt has failed to apply for, or has been denied a discharge in a former proceeding.[7] This will not prevent granting a discharge for what it is worth.[8]

The six years' limit runs from the date of the discharge in voluntary proceedings to the date of judicial action upon an application for the next discharge either in voluntary or involuntary proceedings.[9]

§ 280d. Sixth ground of opposing discharge, that bankrupt has refused to obey an order of court or to answer a question.

A bankrupt will not be granted a discharge in proceedings begun since February 5, 1903, when, in the course of the proceedings in bankruptcy, he has refused to obey any lawful order of or to answer any material question approved by the court.[1]

To prevent a discharge it must appear that the order was lawful and made in the course of bankruptcy proceedings. If the bankrupt is guilty (not necessarily convicted) of contempt in refusing to obey an order of court made in bankruptcy proceedings, he is not entitled to a discharge. It is not necessary that a bankrupt actually declare that he will not obey the order. A delay or failure to perform on his part for a reasonable time, after an order is made, is a sufficient refusal to prevent a discharge.

To prevent a discharge for refusing to answer a question it should be observed that the question must be material and approved by the judge or referee. If the bankrupt refuses to answer such a question, he is not entitled to his discharge.[2]

[7] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505.

[8] *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128.

[9] *In re* Little (C. C. A. 7th Cir.), 137 Fed. Rep. 521, 13 Am. B. R. 640; *In re* Jordan, 142 Fed. Rep. 292, 15 Am. B. R. 449.

[1] B. A. 1898, Sec. 14*b*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[2] *In re* Dresser (C. C. A. 2d Cir.), 146 Fed. Rep. 383, 16 Am. B. R. 561, affirming 144 Fed. Rep. 318, 13 Am. B. R. 616.

It does not deprive him of his constitutional right of immunity from self incrimination. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only, and it may always be waived by the witness himself.[3] It is within the power of Congress to grant or to refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, or a right of property, but is a matter of favor, to be accepted upon such terms as Congress sees fit to impose.

§ 281. Pleading to a specification.

As has been stated, the filing of a specification of grounds of opposition to a bankrupt's discharge in the bankruptcy proceedings is in the nature of a new suit. It calls for pleading by the bankrupt.[1]

Where the allegations of the specification are vague and general he may move to have them stricken out,[2] or he may rely upon this defense at the time of the hearing, for the court will disregard vague and general allegations.[3] If the allegations are insufficient in law he may file exceptions to them analogous to those allowed in equity,[4] or he may demur.[5] All objections to specifications for formal defects must be raised before the issue is tried on the merits or the

[3] Burrell v. Montana, 194 U. S. 572, 48 L. Ed. 1122, 12 Am. B. R. 132.

[1] See *ante*, Sec. 276.

[2] *In re* Waggoner, No. 17037 Fed. Cas., 1 Ben. 532; *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1.

[3] *In re* Peck, 120 Fed. Rep. 972, 9 Am. B. A. 747; *In re* Goodale, 109 Fed. Rep. 783, 6 Am. B. R. 493; *In re* Steed, 107 Fed. Rep. 682, 6 Am. B. R. 73; *In re* Parish, 122 Fed. Rep. 553, 10 Am. B. R. 548; *In re* Hendrick 138 Fed. Rep. 473, 14 Am. B. R. 795.

[4] *In re* Rosenfield, No. 12057, Fed. Cas., 2 N. B. R. 116; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Robinson, 123 Fed. Rep. 844, 10 Am. B. R. 477.

[5] *In re* Crist, 116 Fed. Rep. 1007, 9 Am. B. R. 1; *In re* Levey, 133 Fed. Rep. 572, 13 Am. B. R. 312; *In re* Burk, No. 2156 Fed. Cas., Deady, 425; *In re* McVey, No. 8932 Fed. Cas., 2 N. B. R. 257.

defect is waived.[6] Where the bankrupt desires to make a general defense, as by confession and avoidance, or otherwise, he may do so by answer.

When a bankrupt has been allowed to file his petition for discharge more than a year after adjudication insufficient grounds for the delay should be seasonably set up by motion to vacate.[7]

§ 282. The hearing of objections to a discharge.

The statute provides that "the judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be heard, and investigate the merits of the application.[1]

It is the duty of the bankrupt to set his application for a discharge for hearing. But laches in so doing is not a ground for dismissal.[2] If the bankrupt is dilatory in bringing the matter on for hearing an opposing creditor may set the application for discharge and specification of objections for hearing.[3] If a creditor, who has duly filed specification of objections to the bankrupt's discharge, abandons it, the court in its discretion may permit other creditors to carry on the opposition, as if they had originally filed the specification.[4]

The bankrupt may be required to attend the hearing, if

[6] *In re* Baldwin, 119 Fed. Rep. 796, 9 Am. B. R. 591; *In re* Baerncopf, 117 Fed. Rep. 975, 9 Am. B. R. 133; *In re* Robinson, 123 Fed. Rep. 844, 10 Am. B. R. 477; *In re* Scott, 126 Fed. Rep. 981, 11 Am. B. R. 327.

[7] *In re* Haynes & Sons, 122 Fed. Rep. 560, 10 Am. B. R. 13.

[1] B. A. 1898, Sec. 14*b*.

[2] *In re* Wolff, 132 Fed. Rep. 396, 13 Am. B. R. 95.

[3] *In re* Sutherland, No. 13640 Fed. Cas., Deady, 573.

[4] *In re* Houghton, No. 6730 Fed. Cas., 10 N. B. R. 337; *In re* Sanborn, 131 Fed. Rep. 397, 12 Am. B. R. 428; *In re* Dietz, 97 Fed. Rep. 563, 3 Am. B. R. 316.

In re Houghton, *supra*, Judge Lowell said: "I will not undertake at this time to lay down any rules for the application of this discretionary power. A great variety of circumstances may be found in the different cases. But it is obvious that among them may be the fact that the debtor has bought off the original objecting creditor after the time for filing specifications has passed; and this could not have been availed of before it occurred. No doubt many other cases may call for the exercise of the power."

creditors request it.[5] If he fails to do so, his application for a discharge may be dismissed.[6]

The application for a discharge must be heard and decided by the judge.[7] He may try the issues himself or may refer such an application to the referee to ascertain and report the facts.[8] The referee can not finally determine the question of discharge or non-discharge,[9] but he may be ordered to report the facts and his recommendation or conclusion as to the matter. He aids the court like a master in chancery.

By the act of 1867 authority was given the court "in its discretion" to order any question of fact presented by the specification in opposition to a discharge to be tried by jury.[10] The court may in its discretion under the present act direct an issue to be tried by the jury.[11] This course is seldom if ever resorted to.

Where an application for a discharge is contested it is common practice for the judge to refer the matter to the referee for a report. The clerk thereupon sends the referee all papers connected with the application. The referee sets a time and place for the hearing or trial, which is had before him. It is the duty of the referee to determine the sufficiency of the specification so far as to decide whether to permit testimony. If the specification is insufficient, he should report back to the court that nothing has been filed with him in the way of objections requiring the taking of testimony.[12] Application to amend should be made to the judge.[13]

[5] B. A. 1898, Sec. 7, clause 1; *In re* Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.

[6] *In re* Shanker, 138 Fed. Rep. 862, 15 Am. B. R. 109.

[7] B. A. 1898, Sec. 14*b*. .Gen. Ord. 12, clause 3.

[8] Gen. Ord. 12, clause 3. Watson v. McDuff (C. C. A. 5th Cir.), 101 Fed. Rep. 241, 4 Am. B. R. 110; *In re* Rauchenplat, 1 P. R. 471, 9 Am. B. R. 763; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

[9] B. A. 1898, Sec. 38*a*, clause 4. Gen. Ord. 12, clause 3.

[10] R. S. Sec. 5111. Morgan v. Thornhill, 11 Wall. 65, 77, 20 L. Ed. 60; *In re* Holst, 11 Fed. Rep. 856.

[11] B. A. 1898, Sec. 19*b* and 19*c*. See Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672.

[12] *In re* Hendrick, 138 Fed. Rep. 473, 14 Am. B. R. 795; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

[13] *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

As to when amendments will be allowed see Sec. 277, *ante*.

If the specification is sufficient, proofs are introduced in support of and against the grounds of opposition to the discharge. The testimony may be taken down in narrative form or by question and answer.[14] When objections are made to questions and answers, the grounds of the objections and the rulings of the referee should be noted by the referee. He should also include evidence offered, although he may decide it to be incompetent, immaterial or irrelevant.[15] He should receive all the evidence offered and make a record of all that transpires on the examination of the witness. Questions, objections, rulings, exceptions and answers should all be taken down for the use of the court. The judge who is to decide the question of discharge is entitled to have all of the evidence for that purpose and to determine what evidence shall be excluded and what may be included.

The burden of proof is on the objecting creditor to establish by clear and convincing evidence his ground of objection.[16] It is not necessary for the objecting party to prove his case beyond a reasonable doubt; a fair preponderance of evidence is sufficient.[17] Testimony taken upon examination of the bankrupt is taken in the whole proceeding and may be introduced and read upon the hearing of a petition for a discharge.[18] Testimony of persons other than the bankrupt is not admissible upon such hearing.[19] The proof in support of the specification

[14] Gen. Ord. 22.

[15] *In re* Lipset, 119 Fed. Rep. 379, 9 Am. B. R. 32; *In re* Romine, 138 Fed. Rep. 837, 14 Am. B. R. 785. See also Sec. 208, *ante*.

[16] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Eades (C. C. A. 7th Cir.), 143 Fed. Rep. 293, 16 Am. B. R. 30; *In re* Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95; *In re* Hamilton, 133 Fed. Rep. 823, 13 Am. B. R. 333; *In re* Keefer, 135 Fed. Rep. 885, 14 Am. B. R. 290.

[17] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Dauchy, 122 Fed. Rep. 688, 10 Am. B. R. 527.

[18] *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1; *In re* Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380. See Sec. 210*b*, *ante*.

[19] *In re* Wilcox (C. C. A. 2d Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *In re* Goodhile, 130 Fed. Rep. 782, 12 Am. B. R. 380. See Sec. 210*b*, *ante*.

should be confined to proving the allegations contained in it. The opposing party is bound by them and cannot go beyond them and produce evidence outside of them.[20] He is not required to prove all the grounds alleged. If any one ground is sustained by the evidence is sufficient to defeat the discharge.[21] The creditor may be estopped by his own consent to an act from proving it against his debtor on the question of his discharge,[22] or may be barred from objecting to his discharge by laches.[23]

At the conclusion of the testimony the referee will hear arguments of counsel and report to the judge his findings of fact and conclusions of law together with a recommendation as to whether the bankrupt is entitled to a discharge or not.[24] To this report the bankrupt or the persons opposing his discharge may file exceptions. The referee should fix a date within which to file them. The exceptions should be presented to the referee within such time to permit him to correct his report if he is in error.[25] The report together with his record of evidence and all papers and pleadings connected with the application are then sent to the clerk.

The report is considered by the judge, either upon a motion to confirm or upon the exceptions. A day is fixed for hearing before the judge. Counsel may be heard on behalf of the objecting creditors and the bankrupt. The judge reviews both law and fact. He will ordinarily give the same weight to the findings of fact by the referee as are given to reports of masters

[20] *In re* Taplin, 135 Fed. Rep. 861, 14 Am. B. R. 360; *In re* Halsell, 132 Fed. Rep. 562, 13 Am. B. R. 106; *In re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

[21] Hudson v. Mercantile National Bank (C. C. A. 8th Cir.), 119 Fed. Rep. 346, 9 Am. B. R. 432.

[22] *In re* Sawyer, No. 12394 Fed. Cas., 2 Hask. 337; *In re* Schuyler, No. 12494 Fed. Cas., 3 Ben. 200; *In re* Kraft, 3 Fed. Rep. 892; Johnson v. Rogers, No. 7408 Fed. Cas., 15 N. B. R. 1; Judson v. The Courier Co., 8 Fed. Rep. 422.

[23] Kentucky National Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

[24] *In re* Steed & Curtis, 107 Fed. Rep. 682, 6 Am. B. R. 73.

[25] As was done *In re* Kahn, 130 Fed. Rep. 1023, 12 Am. B. R. 793.

in chancery.[26] The judge may permit additional testimony to be introduced before him or he may refer the matter again to the referee for further investigation.[27] He may withhold a discharge for the purpose of allowing a creditor to assert in a state court a right to subject exempt property to the payment of his debt which would be released by the discharge.[28]

The court will not re-open a case for the purpose of introducing additional evidence in opposition to a discharge where the creditor has had ample opportunity to present his case.[29]

A referee is not entitled to extra compensation for services on a reference of a specification of objections to the discharge of a bankrupt.[30] Such compensation has been allowed in a few cases on the ground that the service performed was that of a special master and was not included among the duties required of a referee.[31] It should be observed that General Order 12 expressly provides for such reference to "the referee" and not to a special master. Section 72 added by the amendment

[26] *In re* Covington, 110 Fed. Rep. 143, 6 Am. B. R. 373; *In re* Lafleche, 109 Fed. Rep. 307, 6 Am. B. R. 483; *In re* Stout, 109 Fed. Rep. 794, 6 Am. B. R. 505.

As to the weight to be given a report of a referee generally, see observation of Judge Lowell *In re* Swift, 118 Fed. Rep. 348, 9 Am. B. R. 237.

[27] *In re* Sanborn, 131 Fed. Rep. 397, 12 Am. B. R. 428; *In re* Steed & Curtis, 107 Fed. Rep. 682, 6 Am. B. R. 73.

[28] *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204; *In re* Tiffany, 147 Fed. Rep. 314.

In Lockwood v. Exchange National Bank, 190 U. S. 294, 300, 47 L. Ed. 1061, 10 Am. B. R. 107, the supreme court said: "There would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights of the creditor.

[29] Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

[30] Bragassa v. St. Louis Cycle (C. C. A. 5th Cir.), 107 Fed. Rep. 77, 5 Am. B. R. 700. B. A. 1898, Sec. 72, added by amendment of Feb. 5, 1903, 32 Stat. at L. 797.

[31] Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510.

of 1903 [32] clearly prohibits such compensation. Costs may be taxed to the losing party.[33]

§ 283. The order granting a discharge.

It is the duty of the court to discharge the applicant unless he has committed one of the acts specifically set out as a reason for refusing the discharge.[1] The fact that the discharge may not have the effect to release debts is no ground for refusing it.[2] The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge.[3]

These are the only grounds on which the court can refuse a discharge, except that the judge may refuse it when the court is without jurisdiction of the proceedings.[4] An honest bankrupt is regularly entitled to a discharge, which releases him from all his provable debts except such as are expressly excepted by the statute.[5] The court will not seek for grounds for refusing a discharge unless they are properly presented

[32] 32 Stat. at L. 797.

[33] *In re* Chamberlain, 125 Fed. Rep. 629, 11 Am. B. R. 95; *In re* Grossman, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re* Young, 140 Fed. Rep. 728, 15 Am. B. R. 477.

[1] B. A. 1898, Sec. 14*b*, and amendment of Feb. 5, 1903, 32 Stat. at L. 797; Official Form No. 59; see Form No. 164, *post*. Smith v. Keegan (C. C. A. 1st Cir.), 111 Fed. Rep. 157, 7 Am. B. R. 4; *In re* Maher, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re* Marshal Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Herrman, 134 Fed. Rep. 566, 4 Am. B. R. 139, on appeal (C. C. A. 2d Cir.), 13 Am. B. R. 778.

[2] *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; *In re* Marshal Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Black, 97 Fed. Rep. 493, 4 Am. B. R. 471, *note*.

[3] *In re* Marshal Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *In re* Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592; *In re* Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; *In re* Tinker, 99 Fed. Rep. 79, 3 Am. B. R. 580. See also, as to the effect of this discharge, Tinker v. Caldwell, 193 U. S. 473, 48 L. Ed. 754, 11 Am B. R. 568.

[4] See *ante*, Sec. 278.

[5] B. A. 1898, Sec. 17, and Sec. 1, clause 12.

by the parties.[6] If the parties do not raise objections, the court will consider them to consent to the discharge, or that no reason exists for not granting it. The confirmation of the composition with creditors operates as a discharge of the bankrupt.[7]

An order denying a discharge to a bankrupt is a bar to a second application in the same bankruptcy proceedings.[8]

It has been held that a court of bankruptcy has power to amend a discharge after the term at which it was granted.[9]

§ 284. The general nature and effect of a discharge.

A discharge in bankruptcy is in the nature of a personal privilege granted to a debtor in consideration of his yielding up all of his property for distribution among his creditors. It does not extinguish the bankrupt's liability. It is a release from the unpaid balance of debts existing at the time the petition was filed, which may be pleaded in bar of any action upon a debt so released.[1] Where no discharge is granted there is no release, and the unpaid balance of a debt may be recovered.[2] Bankruptcy proceedings alone do not operate to bar suits.

The confirmation of a composition has the same effect as a discharge.[3]

The discharge of a plaintiff in a state court, where the trustee did not intervene, does not abate the suit.[4]

[6] *In re* Royal, 113 Fed. Rep. 146, 7 Am. B. R. 636; *In re* Schuyler, No. 12494 Fed. Cas., 3 Ben. 200; *In re* Rosenfield, No. 12057 Fed. Cas., 2 N. B. R. 116; *In re* Frey, 9 Fed. Rep. 376.

[7] B. A. 1898, Sec. 14*c*; Sec. 250, *ante*.

[8] *In re* Fiegenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595; *In re* Royal, 113 Fed. Rep. 140, 7 Am. B. R. 636.

[9] *In re* Kaufman, 136 Fed. Rep. 262, 14 Am. B. R. 393.

[1] See Pleading a discharge, Sec. 298, *post*.

[2] Dingee v. Becker, No. 3919 Fed. Cas., 9 N. B. R. 508; Greenwald v. Appell, 17 Fed. Rep. 140; Whitney v. Crafts, 10 Mass. 23. See also *In re* Sweet, 36 Fed. Rep. 761.

[3] See Sec. 250, *ante*.

[4] Griffin v. Mut. Life Ins. Co., 119 Ga. 664.

§ 285. The effect of a discharge upon liens.

The effect of a discharge is to release the personal liability only. It does not affect liens upon his property. If they are valid, under the laws of the state and the bankrupt act, they may be enforced after a discharge is granted.

Thus a judgment which has become a lien on property will continue to be so,[1] but if the judgment is merely a personal liability it is released by a discharge. In an action to enforce a mechanic's lien or mortgage the discharge will not bar the proceedings except as to a personal judgment for a deficiency.[2] A lien created by the levy of an execution more than four months before bankruptcy is not affected by the discharge of the defendant.[3] A vendor's lien for the purchase price of property sold may be enforced after a discharge, provided such lien is recognized by the state laws.[4] Nor can a discharge be pleaded when the question in issue is one of title to property.[5]

The lien of a mortgage given more than four months before bankruptcy is not discharged.[6]

Where property of the bankrupt has been attached by legal

[1] Blum v. Ellis, 73 N. C. 293; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Crosby v. Wentworth, 48 Mass. 10; McCullough v. Caldwell, 5 Ark. 237; Grandin v. First Nat. Bank, 98 N. W. Rep. 70; Bassett v. Thackara, 72 N. J. 81, 60 Atl. Rep. 39; Marx v. Hart, 166 Mo. 503, 8 Am. B. R. N. 438*n*; Smith v. Zachery, 115 Ga. 722, 8 Am. B. R. 240; McCance v. Taylor, 10 Grat. (Va.) 580; Bates v. Tappan, 99 Mass. 376; Bowman v. Harding, 56 Me. 559; Leighton v. Kelsey, 57 Me. 85; Ingraham v. Phillips, 1 Day. (Conn.) 117; Jones v. Lellyett, 39 Ga. 64.

[2] Second Nat'l Bank v. State Nat'l Bank, 10 Bush. (Ky.) 367; Reed v. Bullington, 49 Miss. 223; Scott v. Ellery, 142 U. S. 381, 35 L. Ed. 1050; Pierce v. Wilcox, 40 Ind. 70; Roberts v. Wood, 38 Wis. 60; Stewart v. Anderson, 10 Ala. 504; Truitt v. Truitt, 38 Ind. 16; City Bank v. Walton, 5 Rob. (La.) 158; Holland v. Cunliff, 9 6Mo. App. (7, 10 Am. B. R. 71.

[3] Philmon v. Marshall, 116 Ga. 811, 11 Am. B. R. 180.

[4] Lewis v. Hawkins, 23 Wall. 119, 23 L. Ed. 113; Bassett v. Thachara, 72 N. J. 81, 60 Atl. Rep. 39. In Graham v. Richerson, 115 Ga. 1002, 8 Am. B. R. 700, it was held that no vendor's lien existed in the state.

[5] Berry v. Jackson (Ga.), 8 Am. B. R. 485.

[6] Evans v. Romsaville, 115 Ga. 684, 8 Am. B. R. 236.

proceedings prior to the period of four months next preceding the commencement of proceedings in bankruptcy, a judgment may be entered in the court in which such judgment is pending, to be enforced against the property attached, even though the discharge is pleaded in bar of the further maintenance of the judgment suit.[7] In such cases the judgment can not be enforced against the person of the bankrupt. It was held under the former act that where a suit has been begun before a petition in bankruptcy had been filed, a person might prosecute a suit to enforce a lien upon property fraudulently conveyed by the bankrupt, even though a discharge is pleaded in bar of the suit.[8]

The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt, is not altered by the discharge of the bankrupt.[9]

§ 286. The effect of a discharge on foreign creditors.

A discharge under the national bankruptcy act of the United States operates to release a bankrupt from all his provable debts, except certain debts enumerated in the statute.[1] A discharge operates as a release from any such debt or liability, wherever it has been contracted or arisen,[2] throughout the several states and territories of the United States.[3] It may be set up as a defense in bar of any action upon a

[7] Doe v. Childress, 21 Wall. 642, 22 L. Ed. 549; Bates v. Tappan, 99 Mass. 376; Ingraham v. Philips, 1 Day (Conn.) 117; Bowman v. Harding, 56 Me. 559; Leighton v. Kelsey, 57 Me. 85. See also *In re* Marshall Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Remington Motor Co., 119 Fed. Rep. 141, 9 Am. B. R. 533.

[8] Fetter v. Cirode, 4 B. Mon. (Ky.) 482; Payne v. Able, 7 Bush. (Ky.) 344; Lowry v. Morrison, 11 Paige (N. Y.) 327.

[9] B. A. 1898, Sec. 16. See Sec. 296, *post*.

[1] B. A. 1898, Sec. 17, and amendment of 1903, 32 Stat. at L. 798; Sec. 292, *post*.

[2] Zarega's Case, No. 18204 Ftd. Cas., 4 L. R. 480; Ruiz v. Eickerman, 5 Fed. Rep. 790; Pattison v. Wilbur, 10 R. I. 448.

But see Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

[3] Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am B. R. 225.

debt thereby released, in any court, either state or federal, within the United States.[4] The reason for this is that the territorial effect of a discharge is coextensive with power of the legislature enacting the law. It may be possible that a foreigner can not enforce a claim in the courts of this country, although he may be able to enforce it in a foreign court.

The rule of comity of nations is that a discharge from any debt or liability under the bankrupt law of the country where the debt or liability has been contracted or has arisen, or possibly where it is to be paid or satisfied, will be recognized as a discharge or satisfaction everywhere.[5] "The rule was laid down by Lord Mansfield in Ballantine vs. Golding, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere."[6] Hence a discharge obtained in a court of bankruptcy in the United States, releasing a debt or obligation contracted or incurred in the United States, will be recognized as a discharge of that debt or liability in any country. Thus where a debtor and creditor both resided in the United States, where the debt was created and where the discharge was granted, and afterwards both parties became residents of England, and a suit was there commenced against the debtor on the original in-

[4] See Pleading a discharge, Sec. 298, *post*.

[5] Story on Conflict of Laws, Sec. 340; Dicey on Conflict of Laws, 449.

[6] Lord Ellenborough in Potter v. Brown (1804), 5 East, 130.

In Ellis v. McHenry, 6 L. R. C. P. 234, Bovill, C. J. (1871), applying this principle to the British Colonies, said: "In the first place there is no doubt that a debt or liability arising in any country may be discharged by that laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, wil be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in Burrows v. Jemino, 2 Stra. 733; by Lord Mansfield, in Ballantine v. Golding, Cook's Bk. Law, 419; by Lord Ellenborough, in Potter v. Brown, 5 East, 124; by the Privy Council, in Odwin v. Forbes, Buck. 57; in Quelin v. Moisson, 1 Knapp, 265, 6, n; by the court of Queen's

debtedness, the discharge was held a bar to recovery.[7] The same rule with reference to a discharge in the states has been applied in Canada.[8] The authorities seem to recognize no distinction with reference to the residence of the parties to the contract, whether between citizens or between citizens and a foreigner, or between foreigners.[9]

A discharge from any debt or liability under the national bankrupt act of this country will not be recognized as a release of a debt or liability which has not been contracted or arisen, and is not to be paid or satisfied in this country.[10] It has been held in England that a contract made in England is not discharged under an insolvent act of one of the United States so as to bar a suit upon contract in the English courts.[11]

Where a foreigner comes into a court of bankruptcy for the purpose of proving a debt, he thereby submits himself to the jurisdiction of the court. A discharge in such case will probably bar the foreigner's claim asserted in either a domestic or foreign court.[12] But where a foreigner does not prove his debt in a court of bankruptcy, and has not knowledge of the proceedings, his debt is not barred in any court by the discharge.[12]

Where a discharge does not release a debt or claim under the national bankruptcy act, such debt or claim is not released in any other country.[13]

Bench, in Gardner v. Houghton, 2 B. & S. 743; and by the Court of Exchequer Chamber, in Phillips v. Eyre, L. R. 6 Q. B. 1.

[7] Potter v. Brown, 5 East, 124.

[8] Ohlemacher v. Broek, 44 Upper Canada Rep. 366.

[9] Story on Conflict of Laws, Sec. 340.

[10] Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435; Ellis v. McHenry, L. R. 6 C. P. 228.

See also Bartley v. Hodges, I. B. & S. 375; Story on Conflict of Laws, Sec. 342; Dicey on Conflict of Laws, 451.

[11] Smith v. Buchanan, 1 East, 6, 11. See also Lewis v. Owen, 4 B. & Ald. 654; Philips v. Allan, 8 B. & Ald. 477.

[12] Consult Peck v. Hibbard, 26 Vt. 698; Phelps v. Borland, 103 N. Y. 406.

[13] B. A. 1898, Sec. 17, clause 3; Lizardi v. Cohen, 3 Gill. (Md.) 430; McMenomy v. Murray, 3 Johns. Chan. (N. Y.) 435.

§ 287. The effect of a foreign discharge on American debts.

The same principles which have been stated in the last section as governing the effect of an American discharge in a foreign country are true with reference to the effect of a foreign discharge in the United States. Thus it has been held that a discharge under a foreign law was no bar to an action on a contract made in this country.[1] Where a person voluntarily submits himself to the jurisdiction of the court granting the discharge, to prove his claim and participate in the proceedings, he is bound thereby, and the courts of this country will recognize the discharge as a bar to an action upon a debt released thereby.[2] The courts of this country will also recognize the binding force of a discharge under a foreign law, releasing a debt or a liability which had been contracted or had arisen in that country.

There are many cases decided in the federal and state courts which apply to discharges granted by the courts of one state when sought to be asserted against the citizens of another.[3] These cases can not be considered authority in determining the effect of a discharge between sovereign states unrestricted by constitutional limitations. All of these cases turned upon the peculiar structure of the constitution of the United States prohibiting the states from passing laws impairing the obligation of contracts. This limitation upon state legislatures has been discussed in another place.[4]

[1] McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552; Green v. Sarmiento, No. 5760 Fed. Cas., 3 Wash. C. C. 17.

[2] Peck v. Hibbard, 26 Vt. 698; Phelps v. Borland, 103 N. Y. 406.

[3] Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Baldwin v. Bank, 1 Wall. 234, 17 L. Ed. 534; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Boyle v. Zacharie, 6 Pet. 348, 8 L. Ed. 423; Felch v. Bugbee, 48 Me. 9; Anderson v. Wheeler, 25 Conn. 603; Whitney v. Whiting, 35 N. H. 457; Murphy v. Manning, 134 Mass. 488; Hicks v. Hotchkiss, 7 John. Chan. (N. Y.) 297; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43; Savoye v. Marsh, 10 Met. (Mass.) 594; Producers Bank v. Farnum, 5 Allen (Mass.) 10; Dunlap v. Rogers, 47 N. H. 281; Pierce v. O'Brien, 129 Mass. 314; Towne v. Smith, No. 14115 Fed. Cas., 1 Wood. & M. 115.

[4] Sec. 11, *ante*.

§ 288. In what court the effect of a discharge is determined.

A discharge in bankruptcy discharges the bankrupt from all debts and claims which are made provable against his estate, and which existed on the day the petition was filed, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.[1]

The court of bankruptcy decides whether or not a discharge shall be granted, and if granted, it has the sole power to entertain a proceeding to vacate the same. It does not construe the extent of the discharge with reference to particular debts of the bankrupt.[2] That inquiry is properly to be made only by the court in which a direct suit on the debt is pending, and when the discharge is properly pleaded in bar of the particular debt.[3] The court in which such a direct suit is pending and the discharge pleaded does not modify the order of the court of bankruptcy. Its inquiry should be, is the debt sued on a debt which is released by the discharge pleaded? If it is released under the bankrupt act, the plea should be sustained and the action dismissed. If such court determines that it is a debt not released by the discharge, the plea is bad and should be overruled.

§ 289. What debts are released by a discharge.

A discharge in bankruptcy releases a bankrupt from all of his provable debts,[1] except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are liabilities for obtaining property

[1] Official Form No. 59; see Form No. 164, *post*.

[2] *In re* Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *In re* Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128.

[3] *In re* Rosenberg, No. 12054 Fed. Cas., 3 Ben. 14.

In re Wright, No. 18065 Fed. Cas., 2 Ben. 509, Judge Blatchford said: "There is nothing in the proof of debt in this case which can in any manner conclude or prejudice any party in any tribunal so far as regards the issue of fraud in contracting the debt."

[1] B. A. 1898, Sec. 17, as amended Feb. 5, 1903, 32 Stat. at L. 797.

by false pretences or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer in any fiduciary capacity.

The inquiry of the court, to which is presented the question of whether a debt is barred or not, should be, *first:* is the debt one which was provable in bankruptcy? And *second,* is such debt included in the exceptions specified in Section 17? If the debt was provable and not included in the exceptions it is released by a discharge.

It is not necessary that the creditor actually proved his claim in the proceedings. If it was provable, it is released, although it was disallowed, as where the creditor did not surrender a preference or the debt was barred by statute of limitations.[2]

An unliquidated claim, which might have been liquidated and proved under Section 63*b*, is discharged.[3] The liability of the maker of a note to the surety is a provable claim against the maker's estate and the surety's claim is barred by the maker's discharge.[4] After a discharge of the debtor, a creditor can not enforce his debt against his exempt prop-

[2] Hargardine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225.

As to the distinction between provable and allowable claims, see *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308.

[3] *In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.

[4] Hayer v. Comstock, 115 Ga. 187, 7 Am. B. R. 493.

[5] Groves v. Osburn, 79 Pac. Rep. 500; Bell v. Dawson Grocery Co., 120 Ga. 628, 12 Am. B. R. 160; Claster v. Soble, 22 Pa. Sup. Ct. 631, 10 Am. B. R. 446.

erty,[5] unless a lien had been fastened on such property before the discharge was granted.[6]

Where a debtor assigns his unearned wages to secure a debt, a discharge releases him from having his wages earned after the adjudication applied to the payment of the debt.[7] Where such assignment creates a lien it is not affected by his discharge.[8]

If a debt was not provable it is not released by a discharge.[9] In order therefore to be discharged, it must come within one of the classes enumerated in the statute as being provable against the estate of the bankrupt.[10] What debts are provable against the debtor's estate in bankruptcy is considered at length elsewhere.[11] An unliquidated claim for damages for tort is not a provable claim and therefore is not released by a discharge.[12] A judgment for damages in tort obtained prior to bankruptcy is provable and released by a discharge.[12] The liability of a sheriff for the escape of the bankrupt is not a debt owed by the bankrupt and therefore is not released by a discharge.[13] Only such debts as are in existence at the time of filing the petition are discharged[14]

The statutory exceptions and the classes of debts not released by a discharge are further considered hereafter.[15]

[7] Leitch v. Northern Pac. Ry. Co., 95 Minn. 35, 14 Am. B. R. 409; *In re* West, 128 Fed. Rep. 205, 11 Am. B. R. 782.

[8] Mallin v. Wenham, 209 Ill. 252, 13 Am. B. R. 210.

[9] Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390, 13 Am. B. R.

[6] McKenney v. Cheney, 118 Ga. 387, 11 Am. B. R. 54; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 7 Am. B. R. 506.

1; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; Audubon v. Shufeldt, 181 U. S. 577, 45 L. Ed. 1009, 5 Am. B. R. 829; Clemons v. Brinn (N. Y. Sup. Ct. App. Div.), 7 Am. B. R. 714; Murray v. DeRottenham, 6 John. Chan. (N. Y.) 52; Monroe v. Upton, 50 N. Y. 593; Genn v. Howard, 65 Md. 40; Bush v. Cooper, 18 How. 82, 15 L. Ed. 273; Riggin v. Magwire, 15 Wall. 551, 21 L. Ed. 232; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 865.

[10] B. A. 1898, Sec. 63.

[11] See Provable debts, Chap. XIII.

[12] See Sec. 128, *ante*.

[13] Baer v. Grell (N. Y. Mun. Ct.), 6 Am. B. R. 428.

[14] *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

[15] Secs. 290 to 296, *post*.

§ 289a. The effect of a discharge in a second proceeding.

Debts from which a discharge was denied under a former bankrupt act,[1] or insolvency proceedings,[2] are provable and released by a discharge in bankruptcy.

A discharge obtained in a new proceeding will not release debts provable in a former proceeding under the bankrupt act of 1898, where the bankrupt failed to obtain a discharge in that proceeding.[3] The undischarged debts are provable in the new proceeding. The reason that they are not released by a discharge is that the failure to obtain a discharge in the former proceeding is *res judicata* as to whether or not the bankrupt is entitled to be discharged from the claims of the creditors scheduled and provable in the former proceeding.[4] If this were not so, a bankrupt, who failed to apply for a discharge within the time specified in the statute, by filing a new petition for the purpose of obtaining a discharge only, could thereby avoid the statutory limitation as to time within which to apply for a discharge. If a bankrupt was denied a discharge in the first proceeding, he might file a petition and, because the defense set up in the first proceeding to the granting of the discharge, as a fraudulent transfer within four months of bankruptcy or of a false oath or account in the first proceeding, could not be made in the second proceeding, be able to obtain a discharge from the very debts which the court had held should not be released. If the same defenses could be made, it would require the creditors to litigate again a question already settled. The reason that *res judicata* does not apply to prevent a release of debts, provable in a proceeding under a former bankrupt act, or in insol-

[1] *In re* Herrman, 102 Fed. Rep. 753, 4 Am. B. R. 139, affirmed (C. C. A. 2d Cir.), 106 Fed. Rep. 987.

[2] *In re* Bybee, 124 Fed. Rep. 1011, 10 Am. B. R. 761; Dean v. Justices, 173 Mass. 453, 2 Am. B. R. 163.

[3] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Claff, 111 Fed. Rep. 506, 7 Am. B. R. 128; *In re* Driscoe, No. 4090 Fed. Cas., Low. 430; *In re* Weintraub, 133 Fed. Rep. 1000, 13 Am. B. R. 711.

[4] Kuntz v. Young (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 12 Am. B. R. 505; *In re* Weintraub, 133 Fed. Rep. 1000, 13 Am. B. R. 711.

veney proceedings, is that the issue is not the same. A bankrupt might not be entitled to a discharge under these acts, and yet be entitled to one under the act of 1898.

§ 290. The effect of a discharge on debts due the United States.

The act expressly excepts form the effect of a discharge debts due as taxes levied by the United States, the state, county, district or municipality in which the bankrupt resides.[1]

Whether a debt due the United States, or one of the states, other than taxes, is released by a discharge under the present act, is not free from difficulty. It was held that a debt due the United States was not barred by a bankrupt's certificate of discharge under the act of 1800,[2] or under the act of 1867,[3] where it was extended to a surety on the bond of a public officer.[4] The ground of this rule was that a discharge will not release the debtor from a debt due the sovereign, unless the sovereign is expressly named in the clause relating to discharge of debts. This rule is recognized in England.[5]

The leading case in this country upon this subject is U. S. v. Herron.[6] The reasoning of the court in that case would appear to apply with equal force to the act of 1898. There are, however, two points of distinction to be noted between the act of 1867 and the act of 1898 with reference to this opinion. In the act of 1867 there was no provision in the

[1] B. A. 1898, Sec. 17, clause 1.

[2] U. S. v. King, No. 15536 Fed. Cas., Wall. Sen. 13.

[3] U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275; U. S. v. Rob Roy, No. 16179 Fed. Cas., 1 Woods, 42; Smith v. Hodson, 50 Wis. 279; Hamilton v. Reynolds, 88 Ind. 191.

[4] U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275, overruling U. S. v. Throckmorton, No. 16516 Fed. Cas., 8 N. B. R. 309; U. S. v. Davis, No. 14929 Fed. Cas., 3 McLean, 483.

[5] Anon., 1 Atk. 262; Rex v. Pixley, Bunbury, 202; Craufurd v. Attorney General, 7 Price, 5; 1 Deacon's Bankruptcy, 784.

Sec. 150 of the English bankruptcy act of 1883, 46 and 47 Vic., Chap. 52, provides that "save as herein provided the provisions of this act relating to . . . a discharge shall bind the Crown."

[6] 20 Wall. 251, 22 L. Ed. 275.

clause relating to discharges with reference to the United States, but the fifth class of claims entitled to priority[7] provided that "nothing contained in this title shall interfere with the assessment and collection of taxes by the authority of the United States or any state." It is clear that that provision is the same in import as clause 1 of Section 17 of the present act. The only difference noticeable is the position the clauses occupy in the two acts. In the act of 1898 it is in the section relating to discharges. Does this rule *expressio unius, exclusio alterius* apply to exclude all debts due the United States except for taxes?

In Section 57*j* the act provides that debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law. This provision is a limitation upon the rights of the sovereign. Were it not for this provision the debtor would be liable for the whole amount of the penalty. It can not be contended but what the United States may or may not prove its debts in the bankruptcy proceedings.[8]

It would seem therefore that these two points of difference can hardly be urged as sufficient to take the present act out of the general rule announced and followed in U. S. *v.* Herron. It would seem that if congress had intended a departure from the general rule relating to the sovereign not being bound by the provisions of a bankrupt statute, which has

[7] R. S. Sec. 5101, which embraces a part of Sec. 28 of the original act.

[8] Lewis v. The United States, 92 U. S. 618, 23 L. Ed. 513; Bayne v. United States, 93 U. S. 642, 23 L. Ed. 997; Harrison v. Sterry, 5 Cranch, 289, 3 L. Ed. 104.

[9] Commonwealth v. Hutchinson, 10 Pa. St. 466; Saunders v. The Commonwealth, 10 Grat. (Va.) 494; Connecticut v. Shelton, 47 Conn. 400; Johnson v. The Auditor, 78 Ky. 282. But see Jones v. The State, 28 Ark. 119.

long been recognized in England and in this country, it would have expressed its intention more clearly in this respect.

By a similar course of reasoning many of the state courts reached the same conclusion with reference to debts due a state. Such debts were held not barred by a discharge in bankruptcy either under the act of 1841 or the act of 1867.[9]

§ 291. The effect of a discharge upon judgments against the bankrupt.

A discharge releases all judgments, provable in bankruptcy, except such as are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.[1] Subject to these exceptions, judgments entered prior to the filing of the petition, granted in actions founded in contract, are discharged.[2] Since the amendment of 1903 it is immaterial whether or not the claim is in the form of a judgment, as the word "judgments" has been omitted and "liabilities" substituted. If it is a liability for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female or for criminal conversation, it is not discharged.[3]

Judgments and decrees are not released where they are in the nature of penalties or fines, imposed for wrongful or criminal acts, or to enforce a moral or natural duty. Such are judgments imposing a fine for contempt,[4] or directing

[1] B. A. 1898, Sec. 17, clause 2. As to what judgments are provable, see Sec. 115, *ante*.

[2] B. A. 1898, Sec. 63, clause 1; Sec. 115, *ante;* Blake v. Bigelow, 5 Ga. 437; Comstock v. Grout, 17 Vt. 512; *In re* Comstock, 22 Vt. 642; *In re* Sidle, No. 12844 Fed. Cas., 2 N. B. R. 220; Duncan v. Hargrove, 22 Ala. 150.

[3] B. A. 1898, Sec. 17 as amended Feb. 5, 1903, 32 Stat. at L. 797.

[4] People v. Spalding, 10 Paige (N. Y.) 284, 4 How. 21; Macey v. Jordan, 2 Dem. (N. Y.) 570. See also *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590; but see *In re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

the payment of certain sums periodically, for the support of a bastard or other child,[5] or in actions for seduction,[6] or directing the payment of alimony.[7] These judgments are not deemed debts within the meaning of that word as used in bankruptcy.[8] The amendment to 1903 expressly excludes such liabilities from those to which a discharge will be a release. A verdict is not a judgment,[9] and the report of a referee or master is equivalent to the verdict of a jury.[10]

A judgment for costs in a criminal case is released by a discharge.[11] A judgment against a firm is not released by the discharge of a partner.[12] A judgment in a "stockholders' liability" suit against the stockholders severally for the par value of their respective holdings, is a provable debt against a non-resident bankrupt stockholder's estate and is released by his discharge.[13]

[5] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101; *In re* Cotton, No. 3269 Fed. Cas., 2 N. Y. Leg. Obs. 370; Comm. v. Erisman, 21 Pitts. L. Jour. 69.

[6] *In re* Cotton, No. 3269 Fed. Cas., 2 N. Y. Leg. Obs. 370; Nassau v. Parker, 2 Penn. L. Jour. 298. Such cases are put on the ground of not being judgments for willful and malicious injury. *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479; *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; Distler v. McCauley, 35 Misc. (N. Y.) 411, 6 Am. B. R. 491; so also of a judgment for criminal conversation, Colwell v. Tinker, 35 Misc. (N. Y.) 330, 6 Am. B. R. 434.

[7] Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390, 13 Am. B. R. 1; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; Barkley v. Barkley, 184 Ill. 375; Turner v. Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289; *In re* Shepard, 97 Fed. Rep. 187, 5 Am. B. R. 857.

As to a judgment for breach of promise, see *In re* Sidle, No. 12844 Fed. Cas., 2 N. B. R. 220; Aling v. Egan, 11 Rob. (La.) 244.

[8] See Sec. 110, *ante*.

[9] Kellogg v. Schuyler, 2 Denio (N. Y.) 73; Nassau v. Parker, 2 Penn. L. Jour. 298; Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Barkley v. Barkley, 184 Ill. 375.

[10] Crooch v. Gridley, 6 Hill (N. Y.) 250.

[11] Olds v. Forrester, 126 Ia. 456, 102 N. W. Rep. 419.

[12] Dodge v. Kaufman, 91 N. Y. Supp. 727.

[13] Dight v. Chapman, 44 Ore. 265; Longfield v. Minnesota Savings Bank, 95 Minn. 54, 14 Am. B. R. 413.

Judgments founded upon provable debts, which have been entered after the filing of the petition and before the consideration of the bankrupt's application for a discharge, are released to the same extent as judgments entered prior to the commencement of the bankruptcy proceedings. Such judgments are made provable debts under the present act.[14] and therefore discharged under Section 17. Under the act of 1867 there was a conflict of opinion among the judges as to whether a judgment entered after the commencement of bankruptcy proceedings and before the discharge was granted was a provable debt or not. Some judges held that the original debt was merged in the judgment and the original debt extinguished; and some judges held to the contrary. The supreme court finally held that, notwithstanding the change in its form from that of a simple contract debt or unliquidated claim, or whatever its character may have been, by merger, into a judgment of a court of record, it still remained the same debt on which the action was brought and the existence of which was provable in bankruptcy and therefore discharged.[15] This is the rule in cases arising under the present act.

Where a judgment is entered upon a debt, whether provable or not, after a discharge has been granted, it is not released by the discharge. The reason for this is that the discharge does not extinguish the debt and can only be used as a defense to the action. Where it is not set up as a defense it is waived.[16] If the discharge is pleaded and the judgment rendered against the bankrupt the adjudication is in effect that the discharge is not a sufficient defense.

Judgments Expressly Excepted by the Statute.—The statement as originally enacted expressly excepted from the effect of a discharge judgments in three classes of cases,[17]

[14] B. A. 1898, Sec. 63, clause 5.

[15] Boynton v. Ball, 121 U. S. 457, 466, 30 L. Ed. 985.

[16] Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 994; McDonald v. Davis, 105 N. Y. 508; Park v. Casey, 35 Tex. 536; Mechanics Bank v. Hazard, 9 Johns. (N. Y.) 392; Desobry v. Morange, 18 Johns. (N. Y.) 336.

See also Pleading a discharge, Sec. 298, *post.*

[17] B. A. 1898, Sec. 17, clause 2.

namely: Judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.

These judgments may be proved in bankruptcy and a dividend paid out of the bankrupt's estate on such claims. The effect of this provision is merely to deprive the bankrupt of the privilege of pleading his discharge in an action for any balance of such judgments remaining unpaid. Such balance may be collected out of his after-acquired property.

First, a discharge does not release judgments in actions for frauds. The act of 1867 did not contain a similar exemption in terms. It was, however, held under that act that a judgment upon a debt fraudulently created did not merge the debt in the judgment so as to take it out of the provision in that act that "no debt created by fraud or embezzlement of the bankrupt shall be discharged." [18] It was held under that act that, where a judgment for a fraudulent debt created by two persons, one of whom afterwards received a discharge, and the other purchased the judgment, he might enforce the judgment against the discharged bankrupt, as there could be no contribution between wrong-doers.[19] A debt created by fraud which has not gone to judgment is not released because of clause 4 of Section 17.[20]

Whether a discharge is obtained in an action for fraud or not is a question for the court to determine, upon the inspection of the record, including the pleadings, and not one to be submitted to a jury.[21] Fraud must be the ground of the recovery of the judgment.[22]

[18] R. S. Sec. 5117; *In re* Pitts, No. 11190 Fed. Cas., 19 N. B. R. 63; Warner v. Cronkhite, No. 17180 Fed. Cas., 6 Biss. 453. But see Palmer v. Preston, 45 Vt. 154.

[19] Balliett v. Seeley, 34 Fed. Rep. 300, reversing 27 Fed. Rep. 507.

[20] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685 and cases cited.

[21] Flanagan v. Pearson, 42 Tex. 1. Burnham v. Pidcock (N. Y. Sup. Ct.), 5 Am. B. R. 590; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108.

[22] Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633.

The clause in regard to judgments for frauds was omitted from the amendment of 1903.[23] In proceedings begun since then judgments in actions for frauds are released by a discharge to the same extent as if the claim had not been reduced to a judgment.

Second, a discharge in bankruptcy does not release a judgment in an action for obtaining property under false pretenses or false representations.[24] The rules governing this class of judgments are the same generally as those relating to judgments in actions for frauds. The action must be founded upon the false pretenses or false representations. Incidental or immaterial false representations in connection with the transaction are not sufficient. They must have been essential to maintaining the action to avail to take the judgment out of the rule that judgments, provable in bankruptcy, are released by a discharge.

By the amendment of 1903 the word "judgments" was changed to read "liabilities."

Third, a discharge in bankruptcy does not release judgments in actions for willful and malicious injuries to persons or property of another.[25]

The effect of this provision is not to except all judgments for torts from the effect of the discharge. In order that a judgment shall not be released, the injury to the person or property must have been willful and malicious. Seduction has been held to be a willful and malicious injury both to the female[26] and to the father;[27] alienation of affections may also be a willful and malicious injury.[28] A judgment by a husband for criminal conversation with his wife is not released by a discharge.[29] A judgment founded upon negligence without malice is not such a judgment. Such judgments

[23] 32 Stat. at L. 797.

[24] B. A. 1898, Sec. 17, clause 2; *In re* Pitts, No. 11190 Fed. Cas., 19 N. B. R. 63.

[25] B. A. 1898, Sec. 17, clause 2.

[26] *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

[27] *In re* Freche, 109 Fed. Rep. 620, 6 Am. B. R. 479.

[28] Leicester v. Hoadley, 66 Kas. 172, 9 Am. B. R. 318.

[29] Tinker v. Colwell, 193 U. S. 473, 48 L. Ed. 754, 11 Am. B. R. 568.

undoubtedly are released by the discharge. Whether the act was willful and malicious must be determined by the record of the court in which the judgment was recovered. It is a question of law for the court, and should not be submitted to a jury.[30]

"Judgment" is here also changed to "liability" by the amendment of 1903.[31] The amendment also enumerates liabilities for injury not released by discharge, which were held by the courts to be included in the original act as the cases cited above in this section show. They are liabilities for "alimony due or to become due, for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation." This has been interpreted by the supreme court as "merely declaratory of the true meaning and sense of the statute."[32] A debt for medical attendance to the wife or child of the bankrupt at his request while the recipient is a member of his family, is not a debt "for maintenance or support of wife or child," which is excepted from the effect of a discharge.[33]

§ 292. The effect of a discharge upon debts not scheduled.

A discharge will not release a bankrupt from debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.[1] Where the court has jurisdiction and the claims have been placed upon the schedule, or if omitted from it and the creditors have had notice or actual knowledge of the proceedings, the debt, if provable, is re-

[30] See Flanagan v. Pearson, 42 Tex. 1.

[31] 32 Stat. at L. 797.

[32] Wetmore v. Markoe, 196 U. S. 68, 77, 49 L. Ed. 390, 13 Am. B. R. 1.

[33] *In re* Ostrander, 139 Fed. Rep. 592, 15 Am. B. R. 96.

[1] B. A. 1898, Sec. 17, clause 3; Birkett v. Columbia Bank, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691. *In re* Monroe, 114 Fed. Rep. 398, 7 Am. B. R. 706; Tyrrel v. Hammerstein, 67 N. Y. Supp. 717, 6 Am. B. R. 430; see also Knapp v. Harrold, 1 C. C. New Series, Ohio, 469.

leased by the discharge.[2] Notice to an agent is sufficient.[3] Where the debt is not scheduled "actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail the creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends."[4]

Where a bankrupt inserts in his schedules an incorrect name or residence of a creditor, upon a suit for the debt such creditor may show that he never had actual knowledge of the bankruptcy proceedings.[5]

The rule established by the present act is quite different in many respects from that under the act of 1867. Under that act, if the notice required by the statute has been duly published, the discharge was held to bar the debt, although the name of the creditor was not placed on the schedule or notice given to him.[6]

[2] Zimmerman v. Ketchum, 66 Kan. 98, 11 Am. B. R. 190; Claster v. Soble, 22 Pa. Sup. Ct. 631, 10 Am. B. R. 446; Knapp v. Harold, 1 Ohio C. C. Rep. (N. S.) 469, 25 Ohio C. C. Rep. 213.

[3] Atkinson v. Elmore, 103 Mo. App. 403; Light v. Chapman, 44 Ore. 265; Longfield v. Minnesota Savings Bank, 95 Minn. 54, 14 Am. B. R. 413.

[4] Birkett v. Columbia Bank, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691.

[5] Westheimer v. Howard, 93 N. Y. Supp. 518, 14 Am. B. R. 547.

In Custard v. Wigderson, the Supreme Court of Wisconsin (Feb., 1907) held debt of plaintiff received in schedule as "A. Castard," was not relaesed by discharge.

See also Sutherland v. Lasher, 84 N. Y. Supp. 56, 11 Am. B. R. 780. Liesum v. Krauss, 35 Misc. Rep. (N. Y.) 376, Schiller v. Weinstein, 91 N. Y. Supp. 76, 15 Am. B. R. 183.

[6] Hill v. Robbins, 1 Mich. (N. P.) 305; Thurmond v. Andrews, 10 Bush, 400; Payne v. Able, 7 Bush, 344; Blum v. Ricks, 39 Tex. 112; Symonds v. Barnes, 59 Me. 191; Hood v. Spencer, No. 6665 Fed. Cas., 4 McLean, 168; Knabe v. Hayes, 71 N. C. 109; Burnside v. Brigham, 49 Mass. 75; Fox v. Paine, 10 Ala. 523; Strong v. Clawson, 10 Ill. 346; Stern v. Nussbaum, 47 How. Pr. (N. Y.) 489; Campbell v. Perkins, 8 N. Y. 430; Morse v. Presby, 25 N. H. 299; Magoon v. Warfield, 3 Greene (Ia.) 293; Hubbill v. Cramp, 11 Paige, 310; Thomas v. Jones, 39 Wis. 124; Downer v. Dana, 22 Vt. 337; Russell v. Cheatham, 16 Miss. 703; Mitchell v. Singletary, 19 Ohio, 291; Pattison & Co. v. Oliver, 10 R. I. 448.

§ 293. Debts created by fraud or embezzlement.

Under the act of 1867 "no debt created by fraud or embezzlement of the bankrupt" was discharged.[1]

Under the act of 1898, after conflicting decisions by the state and federal courts,[2] it is now definitely settled by the decision of the supreme court, that provable debts created by fraud or embezzlement of the bankrupt are generally released by his discharge.[3] If such a debt is not provable against the estate of the bankrupt is not discharged. Only such provable debts fraudulently created are not discharged, as are *first,* liabilities for obtaining property by false pretences or false representations, and, *second*, debts created by the fraud or embezzlement of the bankrupt while acting as an officer or in any fiduciary capacity.[4]

First. As originally enacted clause 2 of Section 17 provided "that judgments in actions for frauds, or obtaining property by false pretences or false representations," are not released by a discharge. This provision was held to apply to judgments alone and not to affect simple contract debts not reduced to judgment.[5] The judgment must have been obtained in an action for fraud or for obtaining property

[1] R. S. Sec. 5117. Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723, and cases cited in the opinion.

[2] *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16; Frey v. Torrey, 75 N. Y. Supp. 40, 8 Am. B. R. 196, affirmed on opinion below, 175 N. Y. 501; Crawford v. Burke, 201 Ill. 581, reversed 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Watertown Carriage Co. v. Hall, 176 N. Y. 313, 11 Am. B. R. 15; *In re* Cole, 106 Fed. Rep. 837, 5 Am B. R. 780.

[3] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; Tindle v. Birkett, 183 N. Y. 264, 564, 15 Am. B. R. 179; Jewett Bros. & Jewett v. Bentson, 18 S. D. 575, 105 N. W. Rep. 173; *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685; *In re* Adler (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 16 Am. B. R. 414.

[4] B. A. 1898, Sec. 17, clauses 2 and 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

[5] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Howe v. Noyes, 93 N. Supp. 476, 15 Am. B. R. 103; Smith & Wallace Co. v. Lambert, 69 N. J. L. 487; Morse & Rogers v. Kaufman, 100 Va. 218, 7 Am. B. R. 549.

by false pretences or by false representations.[6] But the supreme court said that "a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is *ex delicto* or otherwise, but the real question is, was the relief granted in the judgment based upon actual as distinguished from constructive fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned."[7] The words "judgments in actions for frauds" were omitted in the amendment of February 5, 1903.[8] In proceedings begun since that time judgments in that class of actions are released by a discharge to the same extent as if the claim had not been reduced to a judgment.

As clause 2 of Section 17 stands since the amendement of February 5, 1903,[9] "liabilities for obtaining property by false pretences or false representations" are not discharged.[10] The word "liabilities" was substituted for "judgments" by the amendment. Prior to that time it was necessary to reduce a debt arising from obtaining property by false pretenses or false representations to a judgment prior to bankruptcy to prevent its being discharged.[11] All such debts and claims against the estate of the bankrupt, whether reduced to judgment or not, are now preserved against the bankrupt notwithstanding his discharge.

[6] Hargardine-McKittrick Dry Goods Co. v. Hudson (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 10 Am. B. R. 225; *In re* Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; Morse & Rogers v. Kaufman, 100 Va. 218, 7 Am. B. R. 549; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; Goodman v. Herrman, 172 Mo. 344.

[7] Bullis v. O'Beirne, 195 U. S. 606, 620, 49 L. Ed. 340, 13 Am. B. R. 108.

[8] 32 Stat. at L. 797.

[9] 32 Stat. at L. 797.

[10] Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429.

[11] Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429; *In re* Cole, 106 Fed. Rep. 807, 5 Am. B. R. 780.

To fall within this provision the debt must be fraudulent. The essential character of the fraud is the same as under the former statutes, which was held to mean positive fraud or fraud in fact involving moral turpitude or intentional wrong and not implied fraud, which may exist without any imputation of bad faith.[12] In this class of debts the fraud most usually consists in misstatements of the buyer as to his ability to pay or means of payment, such as false statements as to what property he owns, what debt he owes, what kind of business he is doing, that his property is unencumbered and the like. Where the vendee purchases with a positive intention not to pay for the goods a debt is created which is not discharged.

A fraudulent representation which would justify the rescission of a contract of sale is sufficent to prevent a discharge of the debt upon the affirmance of the sale. Cases relating to fraudulent sales are instructive in construing this provision In order to bring a debt within the exception it must be shown that the bankrupt made the representations knowing them to be false and they must have induced the seller to consummate the sale when he otherwise would not have done so.[13] It is not necessary that the false representations should be the sole and exclusive consideration for the credit, but only that they were a material consideration, without which, in all probability, the credit would not have been given.[14] The seller must have relied upon the statements of the buyer as an inducement to make the sale.[15] It is not necessary that the

[12] Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108; Forsyth v. Vehmeyer, 177 U. S. 177, 44 L. Ed. 723, and cases collected in the opinion. *In re* Adler (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 16 Am. B. R. 414; Western Union Cold Storage Co. v. Hurd, 116 Fed. Rep. 442, 8 Am. B. R. 633.

[13] *In re* Patterson & Co., 125 Fed. Rep. 562, 10 Am. B. R. 718; *In re* Gany, 103 Fed. Rep. 930, 4 Am. B. R. 576; *In re* Roalswick, 110 Fed. Rep. 639, 6 Am. B. R. 572; *In re* O'Conner, 114 Fed. Rep. 777, 7 Am. B. R. 428; Bloomingdale v. Empire Rubber Co., 114 Fed. Rep. 1016, 8 Am. B. R. 74.

[14] *In re* Gany, 103 Fed. Rep. 930, 4 Am. B. R. 576.

[15] *In re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 60; *In re* Davis, 112 Fed. Rep. 204, 7 Am. B. R. 276.

false representations be in writing. A promise to pay cash, when the goods are delivered and failure to do so, is not a fraudulent representation.[16] The mere omission of a purchaser of goods to disclose his insolvency to the vendor is not regarded as fraudulent in itself.[17] There is a distinction between withholding information and making false statements with reference to one's financial condition.

Where a bankrupt vendee obtains property from a bankrupt vendor with the intent to hinder, delay and defraud the creditors of the vendor, well knowing that he was insolvent and contemplated bankruptcy, the property was obtained by false pretenses and a debt for the value of the property exists in favor of the trustee of the vendor against the estate of the vendee which is not released by the discharge of the vendee.[18]

Second. The construction of clause 4 of Section 17 resulted in widely different opinions by the courts as to the effect of a discharge upon fraudulent debts. Some courts held that "fraud" should be segregated from the qualifying language "while acting as an officer or in any fiduciary capacity," and that all debts created by fraud were not discharged.[19] Other courts held that all debts created by fraud were discharged, except those created while acting in an official character or in any fiduciary capacity.[20] When the question reached the supreme court it held that clause 4 of Section 17 is limited to frauds, embezzlements, misappropriations or defalcations while acting in an official character or in a fiduciary capacity,

[16] *In re* Lewis, 125 Fed. Rep. 143, 10 Am. B. R. 741.

[17] *In re* Davis, 112 Fed. Rep. 294, 7 Am. B. R. 276.

[18] Mackel v. Rochester, 135 Fed. Rep. 904, 14 Am. B. R. 429.

[19] Frey v. Torrey, 75 N. Y. Supp. 40, 8 Am. B. R. 196, affirmed on opinion below, 175 N. Y. 501; Crawford v. Burke, 201 Ill. 581, reversed 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16; Watertown Carriage Co. v. Hall, 176 N. Y. 313, 11 Am. B. R. 15.

[20] Goodman v. Herman, 172 Mo. 344; Gee v. Gee, 84 Minn. 384, 7 Am. B. R. 500; *In re* Wollock, 120 Fed. Rep. 516, 9 Am. B. R. 685; *In re* Rhutassel, 96 Fed. Rep. 597, 2 Am. B. R. 697; *In re* Bullis, 73 N. Y. Supp. Ct. 1047, 7 Am. B. R. 238, affirmed 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108.

but does not apply to other debts or obligations fraudulently created.[21] The effect of a discharge on this class of debts is considered in the section dealing with fiduciary debts.[22]

§ 294. Fiduciary debts.

A discharge does not release a bankrupt from debts which were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.[1] After conflicting adjudications by the state and federal courts it is now definitely settled by the supreme court that this provision is limited to frauds, embezzlements, misappropriations or defalcations while acting in an official character or in a fiduciary capacity, but does not apply to other debts or obligations fraudulently created.[2]

The phrase "while acting in any fiduciary capacity" relates to special trusts, and does not include those trusts which the law implies from the contract, and which form an element in every agency and in nearly all the commercial transactions in the country. It is confined to technical trusts,[3] and the fiduciary character is not that which the debt gives rise to, but must exist independently of it.[4] Thus a factor, commission merchant, or agent, who has sold property of his principal and has failed to pay over to him the proceeds, is held not to owe to him a debt created in a fiduciary capacity.[5] Where a

[21] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108.

[22] Sec 294.

[1] B. A. 1898, Sec. 17, clause 4.

[2] Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659; Bullis v. O'Beirne, 195 U. S. 606, 49 L. Ed. 340, 13 Am. B. R. 108.

See Sec. 293, *ante*.

[3] *In re* Benedict, 75 N. Y. Supp. 165, 8 Am. B. R. 463; Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23; Crosby v. Miller, Vaughn & Co., 25 R. I. 172; Goodman v. Herman, 172 Mo. 344; Gee v. Gee, 84 Minn. 384, 7 Am. B. R. 500; Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Hennequin v. Clewes, 111 U. S. 676, 28 L. Ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362, affirming 87 N. Y. 303.

[4] Bracken v. Milner, 104 Fed. Rep. 522, 5 Am. B. R. 23.

[5] *In re* Benedict, 75 N. Y. Supp. 165, 8 Am. B. R. 463; Knott v. Putnam, 107 Fed. Rep. 907, 6 Am. B. R.

broker, to secure a debt from himself, hypothecates securities which had been pledged to him to secure the obligation of another, and failed to return them when such obligation was discharged, was held not thereby to create a debt in a fiduciary capacity.[6]

The implied trust relations existing between partners does not bring their affairs within the definition of the excepted term "fiduciary."[7]

A balance due on the subscription to capital stock of a corporation has been held not to be a fiduciary debt.[8] A sum of money to which a wife was entitled on the sale of certain real estate in partition proceedings was decreed to be paid to her husband to have the use of the interest and give bond for the payment of the principal at his death or when ordered to do so by the court. In an action to recover such a principal sum it was held that the liability incurred by the husband was incurred while acting in a fiduciary capacity, and was not discharged by proceedings in bankruptcy.[9]

Executors, Trustees, Guardians, etc.—A discharge does not release a debt due by a testamentary trustee, executor, administrator, or guardian, as such. These are the special or technical trusts, which have been uniformly held to create obligations not released by a discharge. Thus it has been held to be a fiduciary debt where a sum of money is due from an executor, as such, for the residuary legatee,[10] or where

80; *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236.

In Crawford v. Burke, 195 U. S. 176, 189, 49 L. Ed. 147, 12 Am. B. R. 659, the Supreme Court said: "We may remark here in passing that ever since the case of Chapman v. Forsyth, 2 How. 202, this court has held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy acts by withholding the money received for property sold by him. This rule was made under the bankruptcy act of 1841, and has since been repeated many times under subsequent acts."

[6] Crosby v. Miller, Vaughn & Co., 25 R. I. 172; Hennequin v. Clewes, 111 U. S. 676, 28 L. Ed. 565; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362, affirming 87 N. Y. 303.

[7] Gee v. Gee, 84 Minn. 384, 5 Am. B. R. 500; Hill v. Sheibley, 68 Ga. 556.

[8] Morrison v. Savage, 56 Md. 142.

[9] Mock v. Howell, 101 N. C. 443.

[10] Crisfield v. State, 55 Md. 192.

a guardian fails to account for money belonging to his wards. In such cases a surety of the bankrupt, having paid his liability on a bond, may recover such amount from the bankrupt out of property acquired after the discharge.[11]

It should, however, be observed that the debt must be due from the trustee, executor, administrator, or guardian in his official capacity. An individual indebtedness, even though connected with the trust estate, is not a fiduciary debt. Thus where a guardian gave his note under seal to the ward's husband in settlement of his account and received a release from them he was held not liable in a fiduciary capacity.[12] Where a note is given as new evidence of an old debt, without a release, no release of the debt is effected by the discharge.[13] Where an executor gave his personal guarantee of a claim of a creditor against the testate's estate the guarantee was held an ordinary debt and not one created while acting in a fiduciary capacity.[14]

Attorneys.—An attorney, who collects debts for a client, has been held to act in a fiduciary capacity, and will not be released by a discharge from his obligation to pay the money to his client.[15] Where an attorney acts as a gratuitous bailee, and his liability is merely for negligence in failing to return a note, he is released by a discharge.[16]

Officers.—A discharge in bankruptcy does not release a bankrupt from a debt which was created by his defalcation while acting as an officer.[17] Precisely who are included in the term "officer" can not be stated. It manifestly includes all public officers. A collector of city taxes is such an officer,

[11] Carlin v. Carlin, 8 Bush. (Ky.) 141; Halliburton v. Carter, 55 Mo. 435.

[12] Coleman v. Davies, 45 Ga. 489. See also Elliot v. Higgins, 83 N. C. 459.

[13] Madison v. Dunkle, 114 Ind. 262.

[14] Amoskeag Manufacturing Co. v. Barnes, 49 N. H. 312.

[15] Heffren v. Leroy, 39 Ind. 171; Heffren v. Jayne, 39 Ind. 463; Fanagan v. Pearson, 42 Tex. 1; White v. Platt, 5 Den. (N. Y.) 274. But see Wolcott v. Hodge, 81 Mass. 547; Williamson v. Dickens, 5 Ired. Law (N. C.) 259.

[16] McAdoo v. Lummis, 43 Tex. 227.

[17] B. A. 1898, Sec. 17, clause 4.

and a debt due from him to the municipal corporation for taxes received and not accounted for is not discharged.[18] So where a retiring township trustee gives his note to his successor in satisfaction of a debt due the township for funds wrongfully appropriated to his own use, it was held that the debt was not so changed thereby as to be released by a discharge.[19] The mere negligence of a public officer in collecting moneys, which it is his duty to collect, has been held not to be a defalcation.[20]

Sureties on bonds of public officers are not within the exemption. It has been held that a discharge granted to a surety will release him from any liability actually incurred upon his bond, even though his principal is guilty of a defalcation.[21]

An officer of a national bank having the management and control of its affairs is acting in a fiduciary capacity and an indebtedness arising from the embezzlement or misappropriation of the funds of the bank by him is not discharged.[22]

§ 295. Debts created by misappropriation.

It will be observed that clause 4 of Section 17 is substantially a reenactment of the provision of the act of 1867,[1] with the addition of the word "misappropriation" after "embezzlement." It is a new word in bankrupt laws. It is not contained in the English statutes nor in the former United States statutes on the subject of bankruptcy.

The word "misappropriation," construed by the maxim *noscitur a sociis*, means something like embezzlement. It means the fraudulent missapplication of funds intrusted to an

[18] Morse v. Lowell, 48 Mass. 152; Richmond v. Brown, 66 Me. 373.

[19] Madison v. Dunkle, 114 Ind. 262.

[20] Courtney v. Beale, 84 Va. 692.

[21] McMinn v. Allen, 67 N. C. 131; Steele v. Graves, 68 Ala. 21; Fowler v. Kendall, 44 Me. 448; Reitz v. The People, 72 Ill. 435; Jones v. Knox, 46 Ala. 53; Saunders v. Commonwealth, 10 Grat. (Va.) 494. But see U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275.

[22] Harper v. Rankin (C. C. A. 4th Cir.), 141 Fed. Rep. 626 15 Am. B. R. 608.

[1] R. S. Sec. 5117.

officer or person acting in a fiduciary capacity for a particular purpose. It is not necessary that the bankrupt actually embezzles the property or that he reaps any benefit personally from the transaction. It is sufficient if he fraudulently deals with the money, goods, securities, etc., intrusted to him in a fiduciary capacity; or as an officer of a corporation fraudulently misapplies any of its property; or as a public officer fraudulently misapplies public funds which come into his possession. In order to constitute misappropriation the misuse must be tainted with fraud.[2] The misuse of trust funds owing to bad judgment will not constitute misappropriation. The payment of an extravagant price for services or materials properly appertaining to the business of the corporation is not misappropriation by an officer of the corporation.[3] In order to constitute a misappropriation of negotiable paper there must be fraudulent perversion of the original object or design.[4]

It was suggested in an early case[5] that the word "misappropriation applied to debts arising from the misuse or perversion of the property of a principal by a factor, agent, commission merchant, etc. Since the decision in *Crawford* v. *Burke*[6] holding that clause 4 of Section 17 applies only to debts created by the bankrupt "while acting in an official character or in a fiduciary capacity," it is clear that misappropriation does not apply to debts of factors, etc., which are not fiduciary debts.[7]

§ 296. Codebtors not discharged.

The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt, is not altered by the discharge of such bankrupt.[1]

[2] Jackson v. First Nat. Bank, 42 N. J. L. 177; Fox v. Hale & Norcross Silver Mining Co., 108 Cal. 369, 426; Winchester v. Howard, 136 Cal. 432.

[3] Fox v. Hale & Norcross Silver Mining Co., 108 Cal. 369, 426.

[4] Jackson v. First Nat. Bank, 42 N. J. L. 177.

[5] Frey v. Tourey, 8 Am. B. R. 196, 75 N. Y. Supp. 40.

[6] 195 U. S. 176, 49 L. Ed. 147, 12 Am. B. R. 659.

[7] Sec. 294, *ante*.

[1] B. A. 1898, Sec. 16. Compare R. S. Sec. 5118.

This section applies to the discharge in bankruptcy, and does not refer to nor have in view any act of the parties effecting a release of liability in law or in equity.[2] It applies to sureties liable for the debts of the bankrupt existing before and which would be released by his discharge.[3]

The fact that one of the codebtors has received a discharge will not prevent the creditor from suing any one else liable on the same debt; and proceedings pending against others, and unsatisfied judgments already obtained against others for the same debt, are not affected by a discharge or surrendered by proving the debt.[4] Thus the discharge of the maker in no way affects the endorser.[5] There is no obligation resting on the creditor to prove his claim in bankruptcy.[6] The bankrupt statute protects the surety in such cases.[7] The provision quoted above undoubtedly includes partners jointly liable, aalthough they are not expressly mentioned in the section.[8] Where two general partners are discharged, a special partner can not avail himself of their discharge to bar an action against him on a firm obligation.[9] It has been held that a guarantor for rent under a lease was not released of his obligation by the discharge of the lessee.[10]

The question of the effect of a discharge on the liability of sureties on bonds given by the bankrupt, to release property of his which had been attached, where the suit was pending

[2] *In re* McDonald, No. 8753 Fed. Cas., 24 Pitts. L. J. 42.

[3] Carpenter v. Turrell, 100 Mass. 450; Odell v. Wootten, 38 Ga. 224; Knapp v. Anderson, 71 N. Y. 466; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Klipstein & Co. v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, 14 Am. B. R. 15.

[4] *In re* Levy, No. 8297 Fed. Cas., 2 Ben. 169; Payne v. Abel, 7 Bush. (Ky.) 344; Moore v. Walker, 1 A. K. Marsh. (Ky.) 488; Bowery Savings Bank v. Clinton, 2 Sandf. (N. Y.) 113; Seldner v. Smith, 40 Md. 602; Phillips v. Solomon, 42 Ga. 192.

[5] King v. Central Bank, 6 Ga. 257; Clopton v. Spratt, 52 Miss. 251.

[6] Clopton v. Spratt, 52 Miss. 251.

[7] B. A. 1898, Sec. 57*i*.

[8] As to the effect of a discharge upon partners see Sec. 102, *ante*. See also *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63.

[9] Abendroth v. Van Dolsen, 131 U. S. 66, 33 L. Ed. 57.

[10] Witthaus v. Zimmerman, 91 N. Y. App. Div. 202, 11 Am. B. R. 314.

at the time of the commencement of bankruptcy proceedings, was variously answered by the courts under the act of 1867. Some held when a discharge had been granted to a bankrupt, pending a suit in which a judgment on his property had previously been dissolved by the giving of a bond, no judgment could be subsequently entered against him or his sureties. Others held otherwise. The question came before the supreme court ten years after the bankrupt act had been repealed in the case of *Hill* v. *Harding*.[11] It was held in that case that where the attachment of property in an action in the state court was dissolved by the defendant entering into a bond with sureties to pay any final judgment, and the defendant after a verdict against him obtained his discharge in bankruptcy, the bankrupt act did not prevent the state court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to leave the plaintiff at liberty to proceed against the sureties. In that case the court said: "If the sureties should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal, the amount so paid (which is a point not now in issue), it would be because his liability to them upon such claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy nor barred by the discharge, and consequently would not be affected by any provision of the bankrupt act."

Whether a state court can render a formal judgment against the debtor for the single purpose of charging such sureties depend upon the authority of the state court under the local law.[12] If the state court does not have the power,

[11] 130 U. S. 699, 32 L. Ed. 1083.

In re Martin, 105 Fed. Rep. 753, 5 Am. B. R. 423, the court of bankruptcy enjoined the prosecution of such a suit under Sec. 11.

In Marx v. Hart, 166 Mo. 503, 8 Am. B. R. 438*n*, a judgment was entered against the garnishees before bankruptcy, which was a lien under the local law and was not released by the discharge of the debtor, 130 U. S. 699, 32 L. Ed. 1083.

[12] Klipstein & Co. v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, 14 Am. B. R. 15; Hill v.

or, having the power, does not exercise it, to render such judgment the surety is released.[13] The reason is that the surety in such case is bound only to pay the judgment that may be rendered in the specified action. If no judgment results the event has not happened on which the liability of the surety was made to depend. In other words, the liability of the surety rests upon the terms of his undertaking. Section 16 of the bankrupt act does not enlarge the liability of the surety, but only preserves such liability as may exist under the terms of his suretyship from being released by the discharge of his principal.

An attachment lien which is avoided by Section 67*f* can not be enforced by judgment and therefore the surety on the attachment bond will be released. If such proceedings in the state court are stayed under Section 11 until the time within

Harding, 130 U. S. 699, 32 L. Ed. 1083.

[13] Klipstein & Co. v. Allen-Miles Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 385, after considering the state statute the court said: "The condition of the bond dissolving the garnishment is for the payment of the judgment that shall be rendered on the garnishment proceedings. This must be taken to mean for the payment of such a judgment as could have been rendered against the garnishee, if the bond had not been given. Guilford v. Reeves, 103 Ala. 301, 15 South. 661; Collins v. Baldwin, 109 Ala. 402, 19 South. 862. No judgment could have been rendered against the garnishee on the garnishment proceedings, if the bond had not been given, because such proceedings were invalidated by the adjudication in bankruptcy."

In Wolf v. Stix, 99 U. S. 18, 25 L. Ed. 309, the supreme court said: "The cases are numerous in which it has been held ,and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like."

In Payne v. Able, 70 Ky. 344, the court said: "No judgments were or could have been rendered against Able, and hence the contingencies upon which they [the sureties on an attachment bond] were to become liable as sureties have not arisen, and can not now arise."

which to obtain a discharge has expired, no judgment can be rendered, if he pleads his discharge, except a formal judgment for the purpose of charging the sureties. It then falls under the rule above stated. If no discharge is obtained neither the principal nor the sureties are released. Where a trustee is subrogated for an attachment creditor under Section 67*f* of the bankrupt act, he can only enforce the lien against the property attached and no liability of the sureties arises as in case of a personal judgment.

For the same reason a surety on an appeal bond is not released when the discharge can not affect the appeal or stay proceedings upon it or prevent a judgment therein.[14] If the debtor could have availed himself of his discharge to prevent a judgment and terminate the appeal and the action before judgment, or a dismissal of the appeal, the surety would have been released, for the obvious reason that the contingency upon which his liability was made operative could not arise.[15]

The statutory liability of officers and stockholders of a corporation, being in the nature of surety, is not released by the discharge of the corporation. The amendment of February 5, 1903, expressly provides that the bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any such liability.[16] A suit to enforce such statutory liability may be maintained against such officers or stockholders notwithstanding the fact that the corporation has obtained a discharge.[17] A court of bankruptcy may refuse to stay a suit against the corporation, but may permit a judgment to be entered with stay of execution for the purpose of fixing the liability of the stockholders and officers, when such judgment is required as a condition precedent to maintaining suit to enforce the statutory liability of officers

[14] Knapp v. Anderson, 71 N. Y. 466, affirming 7 Hun. (N. Y.) 295; Hall v. Fowler, 6 Hill (N. Y.) 730; World Pub. Co. v. Rialto Grain Co., 108 Mo. App. 480.

[15] Goyer v. Jones, 79 Miss. 253, 8 Am. B. R. 437; Odell v. Wootten, 38 Ga. 224.

[16] B. A. 1898, Sec. 4 as amended, 32 Stat. at L. 974.

[17] Wood v. Vanderveer, 55 N. Y. App. Div. 549.

and stockholders.[18] A judgment against a corporation obtained after a discharge granted and pleaded in the suit is not such a judgment as is required by the Massachusetts statute as a condition precedent to maintain a suit to enforce the statutory liability of its officers and stockholders.[19] It is error for a state court to enter such a judgment.[19] But where the judgment is entered before the discharge is granted or when it is not pleaded it would seem to be a sufficient compliance with such statute.

A discharge does not have the effect of releasing a liability of a surety upon replevin bonds;[20] or upon an administrator's bond;[21] or upon an auctioneer's bond;[22] or upon jail bonds,[23] except where the bankrupt leaves the prison limits after he receives his discharge.[24] Where one of several cosureties is discharged, so that he is released from his liability as such, he is also released from the duty of contribution to his cosureties.[25]

One of several joint debtors discharged in bankruptcy may be made a party to a suit upon a debt from which he is discharged.[26] The reason for this is that the discharge is a personal privilege which he may or may not plead as a defense. If he does not plead his discharge a judgment may be entered against him.[27]

[18] *In re* Marshal Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Remington Auto. & Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533.

[19] Train v. Marshal Paper Co., 180 Mass. 513.

[20] Flagg v. Tyler, 6 Mass. 33. See also Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309.

[21] Moore v. Waller, 1 A. K. Marsh. (Ky.) 488; Miller v. Gillespie, 59 Mo. 220.

[22] Jones v. Russell, 44 Ga. 460.

[23] Dyer v. Cleaveland, 18 Vt. 241; Claflin v. Cogan, 48 N. H. 411; Goodwin v. Stark, 15 N. H. 218.

[24] Kirby v. Garrison, 21 N. J. L. 17

[25] Tobias v. Rogers, 13 N. Y. 59. But see Miller v. Gillespie, 59 Mo. 220.

[26] Jenks v. Opp, 43 Ind. 108; Camp v. Gifford, 7 Hill (N. Y.) 169.

[27] See Pleading a discharge, Sec. 298, *post*.

§ 297. The effect of a new promise upon a discharged debt.

As has been pointed out, the effect of a discharge is to release a bankrupt from his liability for provable debts.[1] He is not bound in law to pay any debt released by his discharge. The moral obligation of the bankrupt to pay it remains. It is due in conscience although discharged in law, and this moral obligation, together with a subsequent promise by the bankrupt to pay the debt, gives a right of action.[2]

There is considerable conflict in the decisions under the former bankrupt acts, as to whether the action should be founded on the original debt or on the new promise. Some judges were of the opinion that the discharge extinguished the debt, and the only cause of action was, therefore, on the new promise.[3] The better authority, however, is to the effect that the new promise revives a debt barred by the discharge, and that the creditor should declare on the original debt and not on the new promise.[4] If the debt were wholly extinguished by the discharge it is hard to see what consideration would support a new promise. Upon principle, therefore, it would seem that the new promise should be considered a waiver of the discharge as a defense.

Where there is no state law requiring the promise to pay a debt discharged in bankruptcy to be made in writing, the promise may be proved by parole, and when proved is bind-

[1] See General nature and effect of a discharge, Sec. 284, *ante*.

[2] Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Morse, 8 Mass. 127; Fletcher v. Neally, 20 N. H. 464; Herdon v. Givens, 16 Ala. 261; Blanc v. Banks, 10 Rob. (La.) 115; Williams v. Robbins, 32 Me. 181; Spooner v. Russell, 30 Me. 454.

[3] Eckler v. Galbraith, 12 Bush. (Ky.) 71; Carson v. Osborn, 10 B. Mon. (Ky.) 155; Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Hobough v. Murphy, 114 Pa. St. 358; Murphy v. Crawford, 114 Pa. St. 496; Fleming v. Lullman, 11 Mo. App. 104; Ross v. Jordan, 62 Ga. 298; Horner v. Speed, 2 Patt. & H. (Va.) 616.

[4] Dusenbury v. Hoyt, 53 N. Y. 300; Maxim v. Morse, 8 Mass. 127; Marshal v. Tray, 74 Ill. 379; Badger v. Gilmore, 33 N. H. 361; Apperson v. Stewart, 27 Ark. 619; Riggs v. Roberts, 85 N. C. 151; Fraley v. Kelly, 67 N. C. 78.

ing.[5] An oral promise made before a statute requiring it to be in writing is binding, and will defeat the defense of a discharge in bankruptcy in actions subsequently brought.[6]

It is immaterial at what date a new promise is made. It is a sufficient consideration if the new promise is made before the discharge as well as after it.[7] It may, however, be doubted if a new promise would entitle a judgment creditor to sue execution on a judgment released by a discharge.[8] An original debt is revived only as of the date of the new promise.[9]

All the authorities agree that the promise by which a discharged debt is revived must be clear, distinct and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred, in case the promise be conditional. The rule is different in regard to the defense of the statute of limitations against a debt barred by the lapse of time. In any case acts or declarations recognizing the present existence of the debt have often been held to take the case out of the statute, but not so in the class of cases relating to new promises reviving debts discharged in bankruptcy. In order to receive a discharged debt the jury must be authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt.[10]

Thus it has been held to be a sufficient promise to support

[5] Hill v. Robins, 22 Mich. 474; Barron v. Benedict, 44 Vt. 518; Apperson v. Stewart, 27 Ark. 619. Brooks v. Paine, 25 Ky. Law Rep. 1125.

[6] Williams v. Robins, 32 Me. 181; Spooner v. Russell, 30 Me. 454. But see Kingley v. Cousins, 47 Me. 91.

[7] Jersey City Ins. Co. v. Archer, 122 N. Y. 376; Griel v. Solomon, 82 Ala. 85; Otis v. Gazlin, 31 Me. 567; Wheeler v. Wheeler, 28 Ill. App. 385.

[8] Shuman v. Strauss, 52 N. Y. 404. This case was dismissed on another ground.

[9] Willis v. Cushman, 115 Ind. 100.

[10] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Stewart v. Reckless, 24 N. J. L. 427; Fraley v. Kelly, 67 N. C. 78; Pratt v. Russell, 61 Mass. 462; Thornton v. Nichols, 119 Ga. 50; Brooks v. Paine, 25 Ky. Law Rep. 1125; Church v. Winkley, 73 Mass. 460.

an action where a debtor promises "to settle" a liquidated demand concerning which there was no dispute between the parties,[11] or where a debtor declared that he was "able and willing to pay the debt,"[12] or the statement "I intend to pay," upon the happening of a particular event,[13] or any agreement to pay or any word signifying an intention to pay or giving assurance that the debtor would pay (although he did not use the word promise),[14] or a promise "to pay the old debts as well as the new,"[15] or a promise to pay the debt he owed "when he shall be able,"[16] It is not necessary that the new promise be made by the bankrupt to the creditor or his authorized agent.[17] It may be made to a third person. The refusal to give a new note is not inconsistent with a promise to pay an existing note.[18] A debt revived by a new promise may be enforced although it was proved in the bankruptcy proceedings.[19]

If the promise is not clear, distinct and unequivocal it does not revive a debt. It is necessary that there be an express promise or an expression by the debtor of a clear intention to bind himself to the payment of the debt.[20] It has been held not sufficient to constitute a new promise where the debtor merely expressed an intention to pay the debt,[21] or declared that he "expects" or "hopes" to pay as fast as he could,[22] or

[11] Stillwell v. Cope, 4 Denio (N. Y.) 225.

[12] Evans v. Carey, 29 Ala. 99.

[13] Dearing v. Moffitt, 6 Ala. 776.

[14] Harris v. Peck, 1 R. I. 262.

[15] Hornthal v. McRae, 67 N. C. 21.

[16] Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[17] Bennett v. Everett, 3 R. I. 152; Comfort v. Eisenbeis, 11 Pa. 13; Evans v. Carey, 29 Ala. 99; Haines v. Stauffer, 13 Pa. 541.

[18] Pratt v. Russell, 61 Mass. 462; Underwood v. Eastman, 18 N. H. 582. See also Horner v. Speed, 2 Patt. & H. 616.

[19] Mason v. Hughart, 9 B. Mon. (Ky.) 480.

[20] Allen v. Ferguson, 18 Wall. 1. 21 L. Ed. 854; Fraley v. Kelly, 67 N. C. 78; Samuel v. Cravens, 10 Ark. 380; Sherman v. Hobart, 26 Vt. 60; Taylor v. Nixon, 4 Sneed (Tenn.) 352.

[21] Allen v. Ferguson, 18 Wall. 1, 21 L. Ed. 854; Stewart v. Reckless, 24 N. J. L. 427; Yoxtheimer v. Keyser, 11 Pa. St. 364; Dearing v. Moffitt, 6 Ala. 776; Church v. Winkley, 73 Mass. 460.

[22] Bartlett v. Peck, 5 La. Ann. 669.

mere admissions of the debt or acknowledgment of the obligation,[23] or where he promised to give his note and did not execute it,[24] or where he has made partial payments,[25] or the mere payment of interest.[26] It has been held that the benefit of the new promise will not pass to the endorsee of a note to whom it is subsequently endorsed, for the new promise is not negotiable.[27]

Where the debtor has promised to pay the debt after his discharge the creditor may bring his action upon the original demand and reply the new promise in avoidance of a plea of discharge.[28] A conditional promise and an unconditional promise may be joined in the same petition.[29] Where the words are capable of being construed as a promise it is for the jury to determine whether the bankrupt intended to promise to pay the debt,[30] or whether the promise was absolute or conditional in case the evidence is conflicting.[31]

§ 298. Pleading a discharge.

A discharge in bankruptcy may be pleaded in bar of an action founded upon a debt released by it. A state court does not lose jurisdiction of the person of a defendant by his being adjudged a bankrupt. A judgment may be rendered against him if he does not plead his discharge. Unless a defendant pleads his discharge he is deemed to have waived

[23] Prewett v. Caruthers, 20 Miss. 491; Bennett v. Everett, 3 R. I. 152.

[24] Porter v. Porter, 31 Me. 169.

[25] Stark v. Stinson, 23 N. H. 259; Viele v. Ogilvie, 2 Greene (Ia.), 326.

[26] Cambridge Inst. v. Littlefield, 60 Mass. 210.

[27] Warwell v. Foster, 31 Me. 558; White v. Cushing, 30 Me. 267; Walbridge v. Harroon, 18 Vt. 448.

But see Way v. Sperry, 60 Mass. 238; Underwood v. Eastman, 18 N. H. 582.

[28] Dusenbury v. Hoyt, 53 N. Y. 521; Maxim v. Norse, 8 Mass. 127.

In those states which held that the action must be brought upon the new promise and not upon the original debt a different rule exists. See Egbert v. McMichael, 9 B. Mon. (Ky.) 44; Carson v. Osborn, 9 B. Mon. (Ky.) 155.

[29] Horner v. Speed, 2 Patt. & H. 616.

[30] Pratt v. Russell, 61 Mass. 462; Bennett v. Everett, 3 R. I. 152.

[31] La Tourette v. Price, 28 Miss. 702.

it as a defense.[1] No proceeding in bankruptcy can be pleaded in bar of an action upon ante-bankruptcy debts except the discharge.[2]

A discharge may be pleaded by the bankrupt,[3] or by a person who has derived title from the bankrupt subsequent to his bankruptcy,[4] but not by other persons.[5] A discharge of two general partners can not be set up in favor of a special partner in an action against the three as general partners on the ground that the special partner has made himself liable as a general partner.[6] Where a bankrupt joins his sureties in pleading his discharge, if the plea is insufficient for them all, it is bad for all.[7]

In what pleading, answer or plea, the defense of a discharge may be set up depends upon the practice relating to particular action and court in which it is pleaded. A plea of discharge is sufficient if it sets out a discharge duly authenticated [8] with

[1] Dimock v. Revere, 117 U. S. 559, 29 L. Ed. 994, affirming 90 N. Y. 33; Horner v. Speman, 78 Ill. 206; Seymour v. Browning, 17 Ohio, 362; Manwarring v. Kouns, 35 Tex. 171; Park v. Casey, 35 Tex. 536; Jenks v. Opp, 43 Ind. 108.

[2] Whitney v. Crafts, 10 Mass. 23; Atkinson v. Fortinberry, 15 Miss. 302; Hayes v. Flowers, 25 Miss. 169; Dick v. Powell, 2 Swan (Tenn.) 632; Ingalls v. Savage, 4 Pa. 224.

In Nat. Bank v. Taylor, 120 Mass. 124, the defendant was allowed a continuance of the suit upon filing a copy of an adjudication until his right to a discharge should be determined by the court of bankruptcy.

[3] Boynton v. Ball, 121 U. S. 457, 30 L. Ed. 985; Banque Franco-Egyptienne v. Brown, 24 Fed. Rep. 106; Ruiz v. Eickerman, 5 Fed. Rep. 790.

[4] Upshur v. Briscoe, 138 U. S. 365, 34 L. Ed. 931; Fleitas v. Mellen, 39 Fed. Rep. 129; Fleitas v. Richardson, 147 U. S. 550, 37 L. Ed. 272.

As to the effect of a discharge granted a *feme sole* who marries, see Chadwick v. Starrett, 27 Me. 138.

[5] Moyer v. Dewey, 103 U. S. 301, 26 L. Ed. 394, as explained in Upshur v. Briscoe, 138 U. S. 378, 34 L. Ed. 931; Frazier v. Banks, 11 La. Ann. 31.

[6] Abendroth v. Van Dolson, 131 U. S. 66, 33 L. Ed. 57.

[7] Dyer v. Cleaveland, 18 Vt. 241; Hall v. Fowler, 6 Hill (N. Y.) 630.

[8] McNeil v. Knott, 11 Ga. 142; Rowan v. Holcombe, 16 Ohio, 463; Downer v. Chamberlin, 21 Vt. 414; Morrison v. Woolson, 23 N. H. 11; Preston v. Simons, 1 Rich. (S. Car.) 262; Lathrop v. Stuart, No. 8113 Fed. Cas., 5 McLean, 167; White v. How, No. 17549 Fed. Cas., 3 McLean, 291.

allegation, which make it effective against the plaintiff.[9] A certified copy of an order confirming a composition or granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.[10] The burden of the proof is upon the bankrupt to show that the debt of the plaintiff is within the class of debts as to which his discharge in bankruptcy operates as a release.[11]

Where a discharge has been granted before the suit on the debt is commenced the plea of discharge should be set up in the first instance. The court will not permit it to be set up by amendment, unless a good excuse for omitting it is shown. Where a discharge is granted pending the suit the defense of discharge in bankruptcy is regularly permitted to be set up by amendment or supplemental answer or other proper pleading.[12] It will not be allowed, however, where application to amend is not seasonably made.[13] Where a discharge is granted after a judgment has been entered it is usually unavailing as a defense.[14] Such a defense may be made in Tennessee by a bill in chancery after the decree of the supreme court, but not by the suggestion of the fact in that court. Such proceeding performs the office of a plea of discharge in bankruptcy and enforces the same rights.[15] Judg-

[9] Bailey's Admx. v. Gleason, 76 Vt. 115; Fowler v. Michael, (Tex. Civ. App., June 1, 1904), 81 So. W. Rep. 321.

[10] B. A. 1898, Sec. 21*f*; Boas v. Hetzel, 3 Pa. 298; Morse v. Cloyes, 11 Barb. (N. Y.) 100; Pennell v. Percival, 13 Pa. 197.

[11] Wineman v. Fisher, 135 Mich. 604; Imhoff v. Whittle, (Tex Civ. App., Nov. 2, 1904), 82 So. W. Rep. 1056.

[12] Richards v. Nixon, 20 Pa. 19; Lyon v. Isett, 34 N. Y. Supp. 41; Holyoke v. Adams, 59 N. Y. 233; Fellows v. Hall, No. 4722 Fed. Cas., 3 McLean, 281; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; Keene v. Mould, 16 Ohio, 12.

In Nat. Bank v. Taylor, 120 Mass. 124, the defendant filed an order of adjudication in the state court and was permitted to have a continuance to await the determination of the question of whether he received a discharge.

[13] Medbury v. Swan, 46 N. Y. 200; Barstow v. Hansen, 2 Hun. (N. Y. Supr.) 333.

[14] Dimock v. Revere, 117 U. S. 559, 29 L. Ed. 994; Wolf v. Stix, 96 U. S. 541, 24 L. Ed. 640; Lane v. Holcombe, 182 Mass. 360.

[15] Wolf v. Stix, 99 U. S. 1, 25

ments by default have frequently been set aside to allow a plea of discharge.[16] An execution should not issue upon a judgment after the debtor has obtained a discharge.[17] If an execution is issued it may be perpetually stayed.[18]

Where a discharge is not granted until the case is in an appellate court it will not avail the defendant ordinarily as a defense,[19] because there is no way in which it can be brought before the court. It has been held, however, that the appellate court might enter a judgment *pro forma* where a discharge was suggested.[20]

§ 299. Revoking discharges.

The statute provides that "the judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.[1]

L. Ed. 309, 96 U. S. 541, 24 L. Ed. 640.

[16] Savings Bank v. Webster, 48 N. H. 21; Lee v. Phillips, 6 Hill (N. Y.) 246; Carter v. Goodrich, 1 How. Prac. (N. Y.) 239; Shurtleff v. Thompson, 63 Me. 118; Park v. Casey, 35 Tex. 536; Manwarring v. Kouns, 35 Tex. 171.

[17] Francis v. Ogden, 22 N. J. L. 210; Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Hill v. Harding, 130 U. S. 699, 32 L. Ed. 1083; Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309.

[18] Alcott v. Avery, 1 Barb. Chan. (N. Y.) 347; Thomas v. Shaw, 2 Cin. Sup. Ct. 97; Chambers v. Neal, 13 B. Mon. (Ky.) 256; McDougald v. Reid, 5 Ala. 810; Curtis v. Slosson, 6 Pa. 265; Graham v. Pierson, 6 Hill (N. Y.) 247; Stewart v. Hargrove, 23 Ala. 429; Bank v. Franciscus, 10 Mo. 27.

[19] Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309; Wolf v. Stix, 96 U. S. 541, 24 L. Ed. 640; Cornell v. Dakin, 38 N. Y. 253; Riggs v. White, 4 Heisk. (Tenn.) 503; Longley v. Swayne, 4 Heisk. (Tenn.) 506.

[20] Bank v. Onion, 16 Vt. 470; Haggerty v. Morrison, 59 Mo. 324.

[1] B. A. 1898, Sec. 15 and Sec. 2, clause 12.

Compare R. S. Sec. 5120. The act of 1841 provided that a discharge might be impeached in all courts of justice for certain causes and in the manner in the act stated. (Act of 1841, Sec. 4, 5 Stat. at L. 440.) Under the act of 1800

This provision prescribes the form, the time within which and the grounds upon which direct proceedings to impeach a discharge may be had. The remedy thus given is exclusive. The application must be made to the court which granted the discharge. The order of discharge can not be questioned or attacked collaterally in any other court, either state or federal.[2] A certified copy of the order granting a discharge, not revoked, is evidence of the jurisdiction of the court, the regularity of the proceeding, and of the fact that the order was made.[3]

The application must be made by a party in interest. A creditor, whose name has been omitted from the schedule, and who has had no notice or knowledge of bankruptcy proceedings, or who has no provable claim, has not such an interest as will enable him to institute proceedings to vacate a discharge. The reason for this is that his debts are not affected by the discharge.[4] The fact that a creditor is barred from proving his claim by Section 57*n* does not prevent him from being a party in interest.[5]

The application must be filed within one year after the discharge has been granted, and by one who has not been guilty of undue laches.[6] Where the petition is not filed within one year from the date of the discharge it is absolutely

discharge might be impeached when pleaded as a defense. (Act of 1800, Sec. 34, 2 Stat. at L. 19.)

[2] Corey v. Ripley, 57 Me. 69; Oates v. Parish, 47 Ala. 157; Ocean National Bank v. Olcott, 46 N. Y. 12; Dusenbury v. Hoyt, 53 N. Y. 521; Reed v. Bullington, 49 Miss. 223; Way v. Howe, 108 Mass. 502; Alston v. Robinett, 37 Tex. 56; Beardsley v. Hall, 36 Conn. 270; Smith v. Ramsey, 27 O. S. 339; Seymour v. Street, 5 Neb. 85; Commercial Bank of Manchester v. Buckner, 20 How. 108, 15 L. Ed. 862; Black v. Blazo, 117 Mass. 17; Parker v. Atwood, 52 N. H. 181.

But see Batchelder v. Low, 43 Vt. 662; Poillon v. Lawrence, 77 N. Y. 208.

[3] B. A. 1898, Sec. 21*f*; Allen v. Thompson, 10 Fed. Rep. 116; *In re* Adams, 29 Fed. Rep. 843.

[4] B. A. 1898, Sec. 17, clause 3; *In re* Monroe, 114 Fed. Rep. 398, 7 Am. B. R. 706; *In re* Chandler (C. C. A. 7th Cir.), 138 Fed. Rep. 637, 14 Am. B. R. 512; Arrington v. Arrington, 132 Fed. Rep. 200; 13 Am. B. R. 89.

[5] *In re* Bimberg, 121 Fed. Rep. 942, 9 Am. B. R. 601.

[6] B. A. 1898, Sec. 15.

barred by the statute.[7] The limitation is not in any way controlled by the discovery of the fraud.[8] A person will not be permitted to amend his application after the expiration of one year from the date of the discharge by adding new grounds or acts.[9]

What causes such laches on the part of the applicant as to prevent his making an application within a year from the granting of a discharge depends upon the circumstances of each case.[10] Mere averments by the creditor that he has not been guilty of laches are not sufficient.[11]

The application is made by petition, addressed to the judge and filed in the clerk's office, and not with the referee. It should state[12] the names and residences of the creditors and their interest in the matter; the date upon which the order of discharge was made; the particular acts complained of as fraudulent on the part of the bankrupt; that the knowledge of the fraud has come to the petitioners since the granting of the discharge; that the actual facts did not warrant a discharge; and pray that the discharge be annulled and set side. The

[7] Mall v. Ullrich, 37 Fed. Rep. 653.

[8] Pickett v. McGavick, No. 11126 Fed. Cas., 14 N. B. R. 236; *In re* Brown, No. 1983 Fed. Cas., 19 N. B. R. 312.

[9] *In re* Sims, 9 Fed. Rep. 440.

[10] *In re* Upson, 124 Fed. Rep. 980, 10 Am. B. R. 758; *In re* Murray, No. 9953 Fed. Cas., 14 Blatch. 43, five months was held an unreasonable delay under the circumstances of that case. See also *In re* Beck, 31 Fed. Rep. 554; *In re* Hunter, No. 6902 Fed. Cas., 3 McLean, 297.

In *In re* Dupee, No. 4183 Fed. Cas., 2 Low. 18, Judge Lowell reopened a decree of discharge where the date had been set for hearing an application for discharge upon specification of objections, and a discharge granted in the absence of the creditors, upon a showing that their counsel was unavoidably prevented from being present and from informing them in order that they might obtain a postponement.

In re McIntire, No. 8823 Fed. Cas., 2 Ben. 345, a specification of objections to a discharge had been filed, which was, however, too vague to be triable, and a discharge had been granted. An application one month afterward to have the case reopened, with leave to amend the specification, was denied on the ground of laches.

[11] *In re* Oleson, 110 Fed. Rep. 796, 7 Am. B. R. 22.

[12] As to what a petition should contain, see *In re* Oliver, 133 Fed. Rep. 832, 13 Am. B. R. 582; *In re* Toothaker Bros., 128 Fed. Rep. 187, 12 Am. B. R. 99.

petition should be signed and verified[13] by the creditors or their authorized agent or attorney.

The procedure on such a petition is not prescribed by act or the general orders. The bankrupt should have reasonable notice of the filing of such petition in order to give him an opportunity to make a defense, if any he has. This he may do by demurrer if the petition is not sufficient in law. He should set up his defense on the merits in an answer or a plea. The time within which such pleading should be filed may be fixed by the judge. When an issue is made, the case is ripe for a hearing or trial. This may be had before the judge or a jury.[14] Evidence may be introduced by the petitioning creditors and by the bankrupt, and counsel heard for both parties.

The fact that a creditor can adduce new facts happening since the discharge, which would be competent evidence for a new trial, does not authorize a rehearing or a new trial upon specifications filed in opposition to the discharge of a bankrupt, heard and determined before the discharge.[15]

There is only one ground specified in the statute upon which a discharge can be revoked; and that is, that the discharge "was obtained through the fraud of the bankrupt."[16] The creditor has the right to have the discharge set aside when such fraud was used in obtaining it as would have prevented the granting of the discharge if it were known at the time.[17] It may be doubted if constructive fraud is sufficient

[13] B. A. 1898, Sec. 18*c*.

[14] B. A. 1898, Sec. 19*c*.

[15] *In re* Corwin, 1 Fed. Rep. 847; *In re* McIntire, No. 8823 Fed. Cas., 2 Ben. 345.

But see *In re* Dupee, No. 4183 Fed. Cas., 2 Low. 18, where a case was reopened after discharge was granted.

[16] B. A. 1898, Sec. 15.

[17] *In re* Roosa, 119 Fed. Rep. 542, 9 Am. B. R. 531; *Ex parte* Briggs, No. 1868 Fed. Cas. 2 Low. 380; *In re* Rainsford, No. 11537 Fed. Cas., 5 N. B. R. 381; *In re* Fowler, No. 4999 Fed. Cas., 2 Low. 122; *In re* Douglass, 11 Fed. Rep. 403.

In re Augenstein, 2 MacArthur (D. C.) 322, the court said: "The fraud of the bankrupt in relation to his property is too clear for doubt or discussion. He is shown to have possessed considerable property, of which he gives no rational account, no assets came to the hands of the assignee, and his wife,

to maintain an application to revoke a discharge. It should be actual fraud, as distinguished from fraud in law. The courts have set aside decrees of discharge which were entered either through mistake or by default.[18]

A discharge will not be vacated unless the court is satisfied that the creditor or his representatives had no knowledge of the objections at the time the discharge was granted.[19] Where an attorney has knowledge of objections it will be presumed that the client knows the same facts.[20]

If the court finds that the fraudulent acts alleged are not proved, or that they were known to the creditors before the granting of the discharge, the judgment should be rendered in favor of the bankrupt.[21] In such case the validity of his discharge is not affected by the proceedings. If the court finds that the fraudulent acts, or any of them, alleged by the creditor in his petition are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, and that the actual facts would not warrant the discharge, the judgment should be given in favor of the creditor and the discharge of the bankrupt should be annulled.

The court may set aside the discharge of a trustee which has inadvertently found its way into the files and order him to proceed.[22]

Costs may be awarded to the prevailing party in such a proceeding.[23]

A court of bankruptcy will not set aside a discharge to permit the bankrupt to amend his schedules by including an

when interrogated as to how she came to have a large sum of money, refused to give any explanation. The traces of fraud are apparent upon the slightest examination of the evidence, and little or nothing need be said upon the subject."

[18] *In re* Amory & Leeds, No. 336*a*, Fed. Cas., Betts Ser. Bk. 97; *In re* Dupee, No. 4183 Fed. Cas., 2 Low. 18.

[19] B. A. 1898, Sec. 15; *In re* Bates, 27 Fed. Rep. 604; Marionneaux's Case, No. 9088 Fed. Cas., 1 Woods, 37; *In re* Douglass, 11 Fed. Rep. 403.

[20] *In re* Douglass, 11 Fed. Rep. 403.

[21] *In re* Hoover, 105 Fed. Rep. 354, 5 Am. B. R. 247.

[22] Maybin v. Raymond, No. 9338 Fed. Cas., 15 N. B. R. 353.

[23] *In re* Holgate, No. 6601 Fed. Cas., 8 Ben. 355.

omitted creditor more than a year after the adjudication in bankruptcy.[24]

§ 300. The effect of revoking a discharge.

The effect of annulling an order granting a discharge renders the discharge invalid as a defense to actions upon debts of the bankrupt. Where it is pleaded, the order revoking it is a good answer to the plea. If the judgment of the court is in favor of the bankrupt the validity of his discharge is not affected by the proceedings to revoke it.

The granting of a discharge is in no way dependent upon the settlement of the bankrupt's estate.[1] It may therefore be granted and revoked before the estate is settled and the original trustee discharged. Where this is the case a new trustee is not necessary. Otherwise the creditors of the bankrupt estate may, at their first meeting after a discharge has been revoked or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided the court should do so.[2] Whenever a discharge is revoked, the trustee, upon his appointment and qualification, is vested with the title of all of the property of the bankrupt as of the date of the final decree revoking the discharge.[3]

In the event of a discharge being revoked, the property acquired by the bankrupt, in addition to his estate at the time the adjudication was made, shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such discharge was in force, and the residue, if any, is applied to the payment of the debts which were owing at the time of the adjudication.[4]

[24] *In re* Spicer, 145 Fed. Rep. 431, 16 Am. B. R. 802; *In re* Hawk, 114 Fed. Rep. 916, 8 Am. B. R. 71.

[1] B. A. 1898, Sec. 14.

[2] B. A. 1898, Sec. 44.

[3] B. A. 1898, Sec. 70*d*; McAlpine v. Tourtelotte, 24 Fed. Rep. 69.

[4] B. A. 1898, Sec. 64*c*.

CHAPTER XXVII.

APPELLATE PROCEEDINGS.

§ 301. The appellate courts.

The statute confers appellate jurisdiction in bankruptcy upon three classes of existing courts, as follows:[1] "The supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia." No other court, federal or state, has any appellate jurisdiction to review proceedings in a court of bankruptcy. The circuit courts have no such power under the present statute as they had under the act of 1867.[2]

The circuit court of appeals within whose jurisdiction a territorial court happens to be is vested with jurisdiction to review by petition of revision questions of law arising in the progress of bankruptcy proceedings in such territorial courts, but appeals and writs of error in controversies at law and in equity arising in bankruptcy proceedings and appeals in bankruptcy proceedings proper, lie to the supreme court of the terrritories.[3]

[1] B. A. 1898, Sec. 24*a* and Sec. 1, clause 3. Compare R. S. Secs. 4980 to 4989.

[2] Compare R. S. Secs. 4980 to 4986.

[3] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

§ 301a. The different kinds of appellate jurisdiction.

How to Review the Decision of a Court of Bankruptcy.—An appeal or writ of error may be taken to the supreme court of the United States in any case in which the jurisdiction of the court of bankruptcy is in issue.[1] In such cases the question of jurisdiction alone is certified to the supreme court from the court below for decision.[1]

There are three methods of procedure by which an order, judgment or decree of a court of bankruptcy may be revised by a circuit court of appeals,[2] with power to affirm, reverse or modify the same as follows; to-wit:

First. A final judgment or decree of a court of bankruptcy is a controversy at law or in equity arising in bankruptcy proceedings may be reviewed on writ of error or appeal by the circuit court of appeals, which has appellate jurisdiction of other cases from the same court.[3] Such controversies are not proceedings in bankruptcy proper, but suits at law and in equity arising out of the settlement of the estates of bankrupts.

Second. An order, judgment, or decree, final or interlocutory, in a proceeding in a court of bankruptcy, may be superintended and revised in matters of law on petition for review, by the circuit court of appeals.[4]

Third. A judgment in a bankruptcy proceeding proper may be reviewed on appeal, as in equity, in three classes of cases only; namely, judgments adjudging or refusing to adjudge the defendant a bankrupt; granting or denying a discharge; and allowing or rejecting a claim of five hundred dollars or over.[5]

The circuit courts of appeals have generally held that the

[1] Act of March 3, 1891, Sec. 5, clause 1, 26 Stat. at L. 826. See Certifying Jurisdictional Questions, Sec. 309, *post.*

[2] *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; Burleigh v. Forman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74.

[3] B. A. 1898, Sec. 24*a*. See Secs. 302 and 302*a*, *post.*

[4] B. A. 1898, Sec. 24*b*. See Secs. 312 and 313, *post.*

[5] B. A. 1898, Sec. 25. See Sec. 314, *et seq.*, *post.*

right of appeal and the right of revision by petition are exclusive of each other.[6] A different rule exists in the eighth circuit, where these provisions are held to be cumulative and not exclusive of each other.[7] In that circuit the parties aggrieved in many cases have the option to present the questions of law by petition for revision and questions of law and fact by an appeal.

The supreme court has not expressly decided whether the right of appeal and the right of revision by petition are cumulative or exclusive of each other. That court has often referred to the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts as recognized in Sections 23, 24 and 25 of the bankruptcy act,[8] and has said: "The

[6] *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496; *In re* Mertens (C. C. A. 2d Cir.), 142 Fed. Rep. 445, 15 Am. B. R. 701; *In re* Kuffler (C. C. A. 2d Cir.), 127 Fed. Rep. 125, 11 Am. B. R. 469; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 14 Am. B. R. 34; Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475; *In re* Abraham (C. C. A. 5th Cir.), 93 Fed. Rep. 767, 784, 2 Am. B. R. 266; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595; *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605.

This last case is overruled *In re* McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 15 Am. B. R. 679, and *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689.

[7] *In re* McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 15 Am. B. R. 679; *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689.

See also Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74.

[8] Denver First Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127; Elliott v. Toeppner, 187 U. S. 327, 333-4, 47 L. Ed. 200, 9 Am. B. R. 50; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R 709; Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179,-10 Am. B. R. 135; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1.

provisions as to revisions in matters of law and appeals were framed and must be construed in view of that distinction."[9] In *Hewit* v. *Berlin Machine Works*[10] that court has said: "Section 25*a* relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, while Section 24*a* relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto." In other cases it has been held that where a decision is not open to revision by appeal or writ of error under either of these sections, it might be reviewed on petition for revision under Section 24*b*.[11] This was the only method of reviewing the action of the court of bankruptcy in these cases, because they did not fall within the provisions regulating appeals either in bankruptcy proceedings proper or controversies arising in bankruptcy. It has also been held that the rulings of a court in the progress of a trial by jury can only be reviewed on writ of error.[12]

[9] Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

[10] 194 U. S. 296, 300, 48 L. Ed. 986, 11 Am. B. R. 709.

[11] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Schweer v. Brown, 195 U. S. 172, 49 L. Ed. 144; Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

In First Nat. Bank v. Trust Co., 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, it was said: "And in any view, the proceding was a proceeding in bankruptcy. Being such, an appeal from the decree of the district court under Section 25*a* did not lie, and the parties aggrieved could only invoke the supervisory power under Section 24*b*."

In Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523, an appeal was treated as a petition for revision by the circuit court of appeals for the fifth circuit (*In re* Abraham, 93 Fed. Rep. 767, 784, 2 Am. B. R. 266), and the supreme court considered the decree as rendered in the exercise of the supervisory power in that case. See Holden v. Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, 10 Am. B. R. 786.

[12] Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493.

Whether a petition for revision will lie to revise an interlocutory order in a controversy at law or in equity, which is not appealable under Section *24a* because not final, depends upon the meaning of the word "proceedings" as used in Section *24b*. It will be observed that Section *24b* provides for revising in matters of law "the proceedings of the several inferior courts of bankruptcy." If the word "proceedings" relates only to proceedings in bankruptcy, it is clear that the supervisory power does not extend to any order either interlocutory or final, in such a controversy. If, however, it includes any action of the court of bankruptcy in the exercise of the jurisdiction at law and in equity as well as in bankruptcy, vested in it by Section 2, a suit at law or in equity arising in bankruptcy proceedings may be interrupted at any stage to review, as to matters of law, any ruling of the court of bankruptcy before final judgment or decree. The result would be that a circuit court of appeals might be required to pass on the several questions of law arising in the progress of the trial, and after final decree the whole matter could be again brought into that court by an appeal to review both the law and the facts. This clearly can not be done with respect to rulings of the court in a jury trial.[13] The great weight of authority at present is that the summary jurisdiction is confined to a revision of rulings relating to the administration of estates in bankruptcy proper, and that the doors of the appellate courts are not open to a separate review of each ruling made during the trial, or of interlocutory orders generally, in suits at law or in equity arising out of the settlement of the bankrupts' estates. In most circuits a dissatisfied litigant can not review a question of law by a petition for revision, where the final decision of the court may be reviewed on appeal or writ of error.[14]

[13] Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Ins. Co. v. Comstock, 16 Wall.

[14] *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595; *In re* Worcester

The difficulty in practice is to determine whether the particular case in hand is a "controversy arising in bankruptcy" or a proceeding in bankruptcy proper.[15] A decision of a court of bankruptcy in the former class of cases is reviewable on writ of error or appeal, in the latter by petition for revision. The only safe practice for a lawyer in many instances is to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged.[16] This has become common practice. In some cases an appeal has been treated as a petition for review, when only a question of law was presented by the appeal,[17] but this will not be done where questions of fact and law are both involved in the appeal.[18] If these remedies are exclusive of each other "there is no more reason for treating an appeal as a petition for review than there would be for treating an appeal as a writ of error or *vice versa*." [19]

How to Review a Decision of a Circuit Court of Appeals.—A judgment or decree of a circuit court of appeals in a controversy arising in bankruptcy, on appeal or writ of

County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496.

But see *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689.

[15] As to controversies arising in bankruptcy, see Sec. 302*a*, *post*; as to orders in bankruptcy which may be revised by petition, see Sec. 312, *post;* as to appeals in bankruptcy, see Sec. 314.

[16] *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496; *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689.

[17] Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Russell (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 3 Am. B. R. 658.

In Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523, an appeal was treated as a petition for revision by the circuit court of appeals for the fifth circuit (*In re* Abraham, 93 Fed. Rep. 767, 784, 2 Am. B. R. 266), and the supreme court considered the decree as rendered in the exercise of the supervisory power in that case. See Holden v. Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, 10 Am. B. R. 786.

[18] *In re* Whitener (C. C. A. 5th Cir). 105 Fed. Rep. 180, 5 Am. B. R. 198; Dickas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566; Davidson v Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 15 Am. B. R. 489.

[19] Davidson v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 15 Am. B. R. 489.

error in the exercise of its general appellate jurisdiction, is not made final by Section 6 of the act of March 3, 1891.[20] It may therefore be reviewed by the supreme court of the United States on writ of error or appeal.[21]

Where a proceeding in bankruptcy is revised on petition by the circuit court of appeals its decision may be reviewed by the supreme court of the United States by writ of certiorari, but not on appeal or writ of error.[22] The decision of a court of appeals on appeal has been reviewed by the supreme court on writ of certiorari, where it was a case in bankruptcy reviewable in the court of appeals only by petition to review.[23]

When a case is taken to a circuit court of appeals by an appeal to review a judgment in a proceeding in bankruptcy proper, no appeal lies from that court to the supreme court, except that an appeal may be taken to the supreme court of the United States from a final decree of a circuit court of appeals allowing or rejecting a claim under the bankrupt act in two classes of cases:

First. Where the amount in controversy exceeds the sum of two thousand dollars and the question involved is one which might have been taken from the highest court of a state to the supreme court of the United States,[24] or,

Second. Where some justice of the supreme court of the United States shall certify in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the bankrupt act.[25]

[20] 26 Stat. at L. 826. This section is quoted in full in Sec. 302, *post.*

[21] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 300, 48 L. Ed. 986, 10 Am. B. R. 709; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[22] Mueller v. Nugent, 180 U. S. 640, s. c. 184 U. S. 1, 46 L. Ed. 495, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 181 U. S. 620, 45 L. Ed. 1031, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Bryan v. Bernheimer, 175 U. S. 724, 44 L. Ed. 338, s. c. 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R 523; Holden v. Stratton, 191 U S. 115, 48 L. Ed. 116, 10 Am. B. R. 786. See Sec. 307, *post.*

[23] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

[24] See Sec. 304, *post.*

[25] See Sec. 304, *post.*

In all other cases the decision of the circuit court of appeals on an appeal in bankruptcy is final and can be reviewed by the supreme court only on writ of certiorari.

How to Review a Decision of a State Court.—The action of the highest court of a state in a suit at law or in equity involving rights or privileges claimed under the bankrupt law may be reviewed by the supreme court of the United States provided it falls within Section 709 of the Revised Statutes.[26]

§ 302. Appellate jurisdiction at law and in equity to revise the action of federal courts.

The bankrupt statute does not affect the appellate jurisdiction of procedure at law or in equity. Decrees in equity and judgments at law, although in controversies relating to bankruptcy, are revised by the appellate courts as before the passage of the act.[1]

The statute regulating the jurisdiction in cases from federal courts provides:[2]

"Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[3]

[26] See Sec. 303, *post*. Rector v. City Deposit Bank, 200 U. S. 405, 411, 50 L. Ed. 527, 15 Am. B. R. 336.

[1] Bardes v. Hawarden Bank, 175 U. S. 526, 44 L. Ed. 261; 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Scott v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 8 Am. B. R. 349; Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 8 Am. B. R. 521; Booneville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74.

[2] Act of March 3, 1891, 26 Stat. at L. 826.

[3] In such cases there must be a certificate of the judge that only the question of jurisdiction was in issue and an appeal will not lie

"From the final sentences and decrees in prize causes.

"In cases of convicition of a capital [or otherwise infamous] [4] crime.

"In any case that involves the construction or application of the constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

"Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final [5] in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every

where other questions were also considered. Denver First Nat. Bank v. Klug, 186 U. S. 203, 46 L. Ed. 1127; or where no final judgment has been entered. Bardes v. Bank, 175 U. S. 526, 44 L. Ed. 261; 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Mitchell v. McClure, 178 U. S. 539, 44 L. Ed. 1182, 4 Am. B. R. 177.

See also Certifying Jurisdictional Questions, Sec. 309, *post*.

For form of certificate and practice generally, see Loveland's Forms of Fed. Practice, Nos. 1334 to 1336.

[4] The words in brackets were stricken out by the act of January 20, 1897; 29 Stat. at L. 492.

[5] Spencer v. Duplan, 191 U. S. 526, 48 L. Ed. 287; Spreckles v. McClain, 192 U. S. 397, 48 L. Ed. 496.

such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.[6] And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if had been carried by appeal or writ of eerror to the supreme court.

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the mater in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

What judgments and decrees are reviewable under this general appellate jurisdiction at law and in equity and the proceedings to review them is considered hereafter.[7]

[6] As was done in Hicks v. Knost, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; White v. Schloeb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; Wall v. Cox, 181 U. S. 244, 45 L. Ed. 485, 5 Am. B. R. 727; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Randolph v. Scruggs, 190 U. S 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

[7] See Sec. *302a, post.*

§ 302a. Controversies arising in bankruptcy.

It is well settled that a circuit court of appeals may review a final judgment or decree of a district court in a controversy arising in bankruptcy proceedings on writ of error or appeal in the exercise of its general appellate jurisdiction as in other cases.[1]

A "controversy arising in bankruptcy proceedings" is in the nature of a plenary action and not a summary proceeding. It may be an independent suit at law or in equity,[2] or an intervention, by petition or otherwise, in the bankruptcy proceedings in which a separable and distinct issue is made and tried on proper pleadings and proofs.[3] A summary order by a court of bankruptcy on a rule to show cause is not such a controversy, although the cause of action is clearly one at law or in equity. Such orders may be reviewed and corrected on petition to revise as to matters of law under Section 24*b*, but not on appeal or writ of error.[4]

By such controversies are meant controversies arising in bankruptcy proceedings in the exercise by the courts of bankruptcy of the jurisdiction vested in them at law and in

[1] B. A. 1898, Sec. 24*a*. Act of March 3, 1891, Sec. 6, 26 Stat. at L. 826. This section is quoted in Sec. 302, *ante*.

Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 16 Am. B. R. 49; Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 14 Am. B. R. 34; Burleigh v. Forman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am B. R. 180.

[2] Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 14 Am B. R. 34. See Bardes v. Hawarden Nat. Bank, 178 U. S. 524, 44 L Ed. 1175, 4 Am. B. R. 163.

[3] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74; Hines v. Moore (C. C. A. 6th Cir), 134 Fed. Rep. 221, 14 Am. B. R. 1; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R 256.

[4] Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144; First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto.[5] A controversy of this kind arises where a third party intervenes in the bankruptcy proceedings and submits to the jurisdiction of the court for the purpose of asserting title to or an interest in property in the possession of the trustee, thereby raising a distinct and separable issue at law or in equity;[6] or where the trustee prosecutes an independent suit to recover property claimed to belong to the bankrupt's estate, which is in the possession of the defendant;[7] or where a third person, having possession of the property claimed to belong to the bankrupt, comes into the court of bankruptcy and submits to its jurisdiction for the purpose of enforcing a lien or other interest in such property, thereby raising a distinct and separable issue at law or in equity.[8] If, however, the property in question is brought into a court of bankruptcy by a secured creditor for administration only without making an issue of this nature, the mere sale and distribution of the proceeds thereof is a proceeding in bankruptcy.

Where it becomes necessary, in the administration of property of a bankrupt's estate in the possession of the trustee, to bring in third parties for the purpose of adjudicating the title or interest of such parties in that property, a proceeding instituted by the trustee to that end is not a controversy arising in bankruptcy, but is a proceeding in bankruptcy proper.[9]

[5] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

[6] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* First Nat. Bank (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B. R. 180; Dodge v. Norlin, 133 Fed. Rep. 363, 13 Am. B. R. 176; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204.

[7] Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 14 Am. B. R. 34; Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 8 Am. B. R. 521; Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 13 Am. B. R. 338.

[8] See Security Warehouse Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 16 Am. B. R. 49.

[9] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 17 Am. B. R. ——; Morgan

The decision of the court of bankruptcy in such a case can not be reviewed on appeal, but may be on a petition for revision.

It has been held that the following proceedings were controversies arising in bankruptcy in which the final decision of the court of bankruptcy was reviewable on appeal or writ of error: a suit in equity by a trustee under Section 67*e* in a district court to recover property for the estate;[10] or a suit by a trustee in the nature of an equitable replevin;[11] or a suit to set aside a preference and recover the property for the estate;[12] or a bill in equity to establish and enforce a lien by a pledgee;[13] or an intervening petition to assert title to property in the possession of the trustee;[14] or an intervening petition by a vendor under a conditional sale of chattels to recover the articles in the possession of the trustee under an unrecorded agreement for the retention of title until payment of the purchase price;[15] or an intervening petition in which a creditor of the bankrupt seeks to enforce a mortgage lien upon property in the possession of the trustee as a part of the bankrupt's estate;[16] or a claim

v. First Nat. Bank (C. C. A. 4th Cir.), 145 Fed. Rep. 466, 16 Am. B. R. 639.

[10] Doroshow v. Ott (C. C. A. 3d Cir.), 134 Fed. Rep. 740, 14 Am. B. R. 34.

[11] Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 8 Am. B. R. 521.

[12] Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13; Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 13 Am. B. R. 338.

[13] Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 16 Am. B. R. 49.

[14] Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

But see *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[15] Dolle v. Cassell (C. C. A. 6th Cir.), 135 Fed. Rep. 52, 14 Am. B. R. 52, on appeal York Mfg. Co. v Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

[16] *In re* First Nat. Bank (C. C A. 6th Cir.), 135 Fed. Rep. 62, 14 Am. B R. 180; Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep 363, 13 Am. B. R. 176; Liddon & Bro. v. Smith (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204.

But see *In re* Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 10 Am. B. R. 359.

by a bankrupt that policies of insurance and their cash value are exempt under the state law and are no part of his estate in bankruptcy;[17] or the claim of a widow for her dower interest in the estate in bankruptcy of her deceased husband;[18] or a proceeeding to marshal assets in the hands of a trustee as between partnership and individual creditors;[19] or where a lessor claims property under a lease with the bankrupt upon confirmation of a composition.[20]

The manner of proceeding to obtain a review of a decree or a judgment in a controversy arising in bankruptcy proceedings and the practice in respect thereto is not changed or affected by the bankruptcy statute.[21] Only final judgments and decrees in such controversies are reviewable.[22] A decree in equity can be reviewed only by appeal and a judgment at law only on writ of error.[23]

The time within which an appeal or writ of error may be sued out in this class of cases is six months from the entry of the decree or judgment sought to be reviewed,[24] except from an interlocutory order or decree in equity granting or continuing an injunction or appointing a receiver when it must be taken within thirty days from the entry of such order or decree.[25] An order granting or continuing an in-

[17] Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 5 Am. B. R. 165.

In Holden v. Stratton (C. C. A. 9th Cir.), 113 Fed. Rep. 141, 7 Am. B. R. 615, s. c. 198 U. S 202, 49 L. Ed. 1018, 14 Am. B. R. 94, a similar question was reviewed by petition.

[18] *In re* McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 15 Am. B. R. 679.

[19] Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 11 Am. B. R. 74.

[20] *In re* Winship Co. (C. C. A. 7th Cir.), 120 Fed. Rep. 93, 9 Am. B. R. 638.

[21] Bardes v. Hawarden Nat. Bank, 175 U. S. 526, 44 L. Ed. 261; 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

[22] Bardes v. Hawarden Nat. Bank, 175 U. S. 526, 44 L. Ed. 261, 3 Am. B. R. 680.

[23] Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 13 Am. B. R. 338.

[24] Act of March 3, 1891, Sec. 11, 26 Stat. at L. 826; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256.

[25] Act of March 3, 1891, Sec. 7, as amended April 14, 1906, 34 Stat at L. ——.

junction or appointing a receiver in bankruptcy proceedings is not reviewable under this provision.[26]

In proceedings in equity instituted for the purpose of carrying into effect the provisions of the act or enforcing the rights and remedies given by it, the rules of equity procedure established by the supreme court of the United States must be followed as nearly as may be.[27] In proceedings at law instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be.[27]

Judgments and decrees of a territorial court in such cases may be reviewed by the supreme court of the territory.[28]

§ 303. Appellate jurisdiction at law and in equity to revise the action of a state court.

The only federal court which can review the action of a state court in a suit at law or in equity is the supreme court of the United States. The cases in which the decision of a state court may be reviewed by the supreme court are pointed out in the Revised Statutes, Section 709. It is immaterial whether the judgment or decree was rendered in a case arising in bankruptcy or not. The state courts have jurisdiction only of suits at law or in equity which may concern bankruptcy matters, and not cases in bankruptcy strictly. The courts of bankruptcy have exclusive jurisdiction in such cases.

The Revised Statutes provide for a review in three classes of cases, namely: Section 709 provides that:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had,

[26] O'Dell v. Boyden (C. C. A. 6th Cir.), 149 Fed. Rep. ——.

[27] Gen. Ord. 36.

As to the practice in obtaining a review of a proceeding at law and in equity in the appellate courts of the United States, see Beach's Mod Eq. Prac., Secs. 954 *et seq.*; Foster's Fed. Prac., Chap. 33; rules of the circuit courts of appeals and of the supreme court; Desty's Fed Prac.; Loveland's Forms Fed. Prac., Nos. 1308 to 1512, and notes thereto.

[28] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; (*and the proceeding upon the reversal shall be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed*). [See R. S., Sec. 1017.]

"The supreme court may (*reaffirm*), reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

Unless a particular case relating to matters in bankruptcy falls within one of these classes it can not be revised in the supreme court.[1] Where a federal question is drawn in question and the decision of the highest court of a state to which the case may be taken is adverse to the federal authority or statute, that decision may be reviewed by the supreme court of the United States.

[1] Cramer v. Wilson, 195 U. S. 408, 49 L. Ed. 256; McKenna v. Simpson, 129 U. S. 506, 32 L. Ed. 771; Boatman's Savings Bank v. State Savings Association, 114 U. S. 265, 29 L. Ed. 174; Wolf v. Stix, 96 U. S. 541, 24 L. Ed. 640; Scott v. Kelly, 22 Wall. 57, 22 L. Ed. 729; Linton v. Stanton, 12 How. 423, 13 L. Ed. 1050.

The supreme court has entertained cases in which the validity and effect of a discharge in bankruptcy was called in question and the decision was against the debtor holding the discharge:[2] where the judgment of a state court was against the trustee in bankruptcy, in an action between him and the bankrupt, where the question at issue was whether the matter in controversy passed to the trustee or not:[3] where the judgment of the state court was against the trustee in bankruptcy, in an action by him to recover property from a creditor on the ground of a fraudulent preference:[4] where a sheriff was sued for moneys obtained by a sale, directed by the court of bankruptcy to be made in the state court, and the decision of the state court was adverse to that authority;[5] where the suit was for the foreclosure of a mortgage on real estate, when the only controversy in the case was as to the effect to be given to a sale of the property under an order of the court of bankruptcy to sell the bankrupt's mortgaged property free from encumbrances;[6] where a state court denied an application to stay a suit and rendered final judgment against the bankrupt;[7] and where an immunity was claimed by the appellant (under the Revised Statutes, Section 711) from the operation of the decree of a state court on their rights, because that statute made the jurisdiction of the courts of the United States exclusive in such cases.[8]

The writs of error are taken to review the decision of a state court in the same manner in a case in which the fed-

[2] Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; Hennequin v. Clews, 111 U. S. 677, 28 L. Ed. 565; Strang v. Bradner, 114 U. S. 555, 29 L. Ed. 248; Neal v. Clark, 95 U. S. 704, 24 L. Ed. 586; Dimock v. Revere Copper Co., 117 U. S. 559, 29 L. Ed. 994; Long v. Bullard, 117 U. S. 617, 29 L. Ed. 1004; Palmer v. Hussey, 119 U. S. 96, 30 L. Ed. 362; Jenkins v. International Bank, 127 U. S. 484, 32 L. Ed. 189.

[3] Williams v. Heard, 140 U. S. 529, 35 L. Ed. 550.

[4] Rector v. City Deposit Bank 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336.

[5] O'Brien v. Weld, 92 U. S. 81, 23 L. Ed. 675.

[6] Factors, etc., Ins. Co. v. Murphy, 111 U. S. 738, 28 L. Ed. 582.

[7] Hill v. Harding, 107 U. S. 631, 27 L. Ed. 493.

[8] Winchester v. Heiskell, 119 U. S. 450, 30 L. Ed. 462.

eral question is one relating to bankruptcy matters as in any other cases. The same rules govern the law and practice in such cases.[9]

§ 304. Jurisdiction of the U. S. supreme court of appeals in bankruptcy.

The supreme court of the United States has no original jurisdiction in bankruptcy. Nor does the statute provide for taking a case to that court on writ of error.

Power to reverse on appeal the action of other courts of the United States in bankruptcy is conferred upon the supreme court in the following cases:

First: From the Supreme Court of the District of Columbia.—The supreme court is invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.[1]

The manner of taking and prosecuting an appeal from such courts to the supreme court is prescribed by the general orders[2] as follows:

Appeals to the supreme court from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, must be taken within thirty days after the judgment or decree, and must be allowed by a judge of the court appealed from, or by a justice of the supreme court;[3] and in every case, in which either party is entitled by the act to take an appeal to the supreme court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon stated sepa-

[9] For practice, see Foster's Fed. Prac., Sec. 477. See Forms Nos. 166 to 175, *post*.

[1] B. A. 1898, Sec. 24, as in Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829.

[2] Consult Sec. 313, *post*.

rately,[3] and the record transmitted to the supreme court on such an appeal consists only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.[3]

When the case is in the supreme court it is governed by the general rules of practice of that court.[4]

SECOND: FROM THE CIRCUIT COURTS OF APPEAL.—The statute provides[5] that "from any final decision of a court of appeals, allowing or rejecting a claim under the act, an appeal may be had under such rules and within such time as may be prescribed by the supreme court of the United States in the following cases and no other: *First*, where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the supreme court of the United States;[6] or, *second*, where some justice of the supreme court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

The supreme court has prescribed by rule 36 that appeals under the act to the supreme court from a circuit court of appeals, or from the supreme court of a territory, or from any court of bankruptcy whatever, shall be taken within thirty days[7] after the judgment or decree, and shall be al-

[3] Gen. Ord. 36.

[4] Consult rules of the supreme court.

[5] B. A. 1898, Sec. 25*b*. This provision is considered at length by the Circuit Court of Appeals for the First Circuit in Hutchinson v. Otis, 10 Am. B. R. 275, 123 Fed. Rep. 14; s. c. on appeal, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135.

See also Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786; Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287.

[6] As was done in Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; Page v. Edmunds, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; Pirie v. Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; Western Tie & Timber Co. v. Brown, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

[7] Conboy v. First Nat. Bank, 203 U. S. 141.

lowed by a judge of the court appealed from, or by a justice of the supreme court of the United States.

In every case in which either party is entitled by the act to take an appeal to the supreme court, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the supreme court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

When the case is in the supreme court it is governed by the general rules of practice of that court.[8]

§ 305. Writs of certiorari from the supreme court.

The bankrupt statute authorizes the supreme court of the United States "to issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."[1] This provision manifestly applies to controversies in bankruptcy cases. It clearly confers upon the supreme court the same power with reference to writs of *certiorari* in bankruptcy cases as that court has in other cases.

Under the laws of the United States now in force the supreme court is authorized to issue writs of *certiorari* for two purposes, namely: *First*, for the purpose of completing a record in a case pending in the supreme court, and, *second*, for the purpose of removing a case from a circuit court of appeals to be reviewed by the supreme court.

§ 306. Certiorari to complete records.

The Revised Statutes authorize the supreme court to "issue writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."[1]

[8] Consult the rules of the supreme court.

[1] B. A. 1898, Sec. 25*d*.

[1] R. S. Sec. 716.

Under this provision the writ of *certiorari* has not been used as freely by the supreme court as by the court of queen's bench in England.[2] It has been used as an auxiliary process only, to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court.[3] It has never been used to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court.[4]

The Evarts acts of March 3, 1891,[5] did not affect this power, and the supreme court may still issue writs of *certiorari* in proper cases.[6]

The circuit courts of appeals are vested, by the act creating them,[7] with the power to grant writs of *certiorari* for the purpose of supplying omissions or curing defects in a record in a case pending in one of these courts. Under this provision the circuit courts of appeals have frequently issued writs of *certiorari* for such purposes, although the cases are rarely, if ever, reported.

The application for a writ of *certiorari* to supply an omission or cure a defect in a record should be made to the court

[2] *Ex parte* Vallandigham, 1 Wall. 243, 249, 17 L. Ed. 589.

[3] Luxton v. North River Bridge 147 U. S. 337, 37 L. Ed. 194; U. S. v. Young, 94 U. S. 258, 24 L. Ed. 153; *Ex parte* Gordon, 1 Black, 503, 17 L. Ed. 134; Barton v. Petit 7 Cranch, 288, 3 L. Ed. 347; Beach's Mod. Eq. Prac., Sec. 963.

[4] *Ex parte* Hitz, 111 U. S. 766, 28 L. Ed. 592; Patterson v. U. S., 2 Wheat. 221, 4 L. Ed. 224; Fowler v. Lindsey, 3 Dall. 411, 1 L. Ed. 658; *In re* Tampa Suburban R. R. Co., 168 U. S. 583, 42 L. Ed. 589.

[5] 26 Stat. at L. 826.

[6] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380, 37 L. Ed. 486. Sup. Ct., Rule 14.

In re Chetwood, 165 U. S. 443, 41 L. Ed. 782, a writ of *certiorari* was allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out writs of error and directing them, or either of them, to refrain from prosecuting the same, might be revised and annulled. This case is explained in Tampa Southern R. R. Co., 168 U. S. 587, 42 L. Ed. 589.

[7] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 12, provides "that the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States." Rule 18, C. C. A. 90 Fed. Rep. clx. See also Loveland's Forms Fed. Prac., Nos. 1477 and 1478.

in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of *certiorari* to issue. The petition should be signed and verified. If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court below, commanding it to return a true and complete record, including the omitted or defective parts, if any there be. The order also regularly contains a direction to the clerk of the appellate court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The appellate court will not undertake to make a record in the inferior court.

The writ of *certiorari* is regularly issued under the hand and seal of the clerk of the appellate court, and is transmitted to the clerk of the court below, together with the transcript and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is returned under the seal of the court. It is not necessary to have the return made by the judge.[8] It is regularly made by the clerk.

If a party insists upon including in the record unnecessary matter the court may prevent injustice being done in dealing with the costs.[9]

[8] Stewart v. Ingle, 9 Wheat. 526, 6 L. Ed. 151.

[9] Union Pac. Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431.

§ 307. Certiorari to remove a case for review.

The provision of the bankrupt statute, with reference to writs of *certiorari*,[1] clearly adopts the same rule, with reference to removing a bankrupt case for review by writs of *certiorari*, that applies to other cases. The authority for the supreme court to issue such writs is found in the act of March 3, 1891.[2] This being the case the rule announced in other cases, with reference to when such writs may properly issue, will be useful in determining under what circumstances the writ may issue in bankruptcy, for the purpose of removing a case from a circuit court of appeals to the supreme court to be there reviewed.

There is no authority for issuing a writ of *certiorari* to remove a case to the supreme court, except such as is found in the act of March 3, 1891.[3] The language of that act is very general. All that is essential is that the case be pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality. When these two elements exist, the supreme court may reach out with its writ of *certiorari* and transfer the case there for review and determination.[4] A decision of a circuit court of appeals on petition for revision is regularly reviewed on writ of *certiorari* and not by appeal or writ of error.[5] The decision of a court of appeals on appeal has been reviewed by the supreme court on writ of *certiorari* where it was a case in bankruptcy reviewable in the court of appeals only by petition to review.[6]

The question at what stage of the proceedings, and under

[1] B. A. 1898, Sec. 25*d*.

[2] 26 Stat. at L. 826, Sec. 6, which is quoted in full Sec. 302, *ante*. Denver National Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127.

[3] 26 Stat. at L. 826; Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380, 37 L. Ed. 486.

[4] Forsyth v. Hammond, 166 U. S. 513, 41 L. Ed. 1095.

[5] Louisville Trust Co. v. Comingor, 181 U. S. 620, 45 L. Ed. 1031, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Bryan v. Bernheimer, 175 U. S. 724, 44 L. Ed. 338, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; Mueller v. Nugent, 180 U. S. 640, 45 L. Ed. 711, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

[6] First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

what circumstances, the case should be required to be sent up for review, is left to the discretion of the supreme court, as the exigencies of each case may require.[7] The supreme court has declined to issue writs of *certiorari* in cases where, there being only a matter of private interest, there has been no final judgment in the circuit court of appeals,[8] and where there was a remedy by appeal or otherwise.[9] Although a writ of *certiorari* is not usually issued until after a circuit court of appeals has pronounced its judgment, the supreme court has issued a writ in one case,[10] appealed to a circuit court of appeals, before any action has been taken by that court. But this was a case involving questions affecting the relation of this country to foreign nations, the decision of which, by the highest court, was important, not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this. The writ may be granted after the mandate of the circuit court of appeals has issued.[11]

§ 308. The application for writ of certiorari to remove a case to the supreme court.

The application for a writ of *certiorari* to remove a case from the circuit court of appeals to the supreme court must be made to the supreme court. The time within which the application must be made is not prescribed by the statute.

[7] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 380, 37 L. Ed. 486.

See also Harris v. Barber, 129 U. S. 368, 32 L. Ed. 697.

[8] Chicago & Northwestern Ry. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002.

[9] *In re* Tampa Suburban Ry. Co., 168 U. S. 583, 42 L. Ed. 589, an application was made for a writ of *certiorari* to a circuit court, where there was a right of appeal to a circuit court of appeals.

See also Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, where there was a writ of *certiorari* and also an appeal.

[10] The Three Friends, 166 U. S. 1, 41 L. Ed. 897, as explained in Forsyth v. Hammond, 166 U. S. 513, 41 L. Ed. 1095.

[11] The Conqueror, 166 U. S. 110, 41 L. Ed. 937.

It should, however, be made within a reasonable time after the final decision of the circuit court of appeals. One year is probably a reasonable time.[1]

The application is made by petition.[2] The style of the case in that court is *A. B., petitioner,* v. *C. D., respondent.* The petition is filed in the office of the clerk of the supreme court, together with a deposit of twenty-five dollars on account of costs and an entry of appearance for the petitioning party, signed by a member of the bar of the supreme court. The case is then docketed. The petitioner must also file a certified copy of the entire record, including all the proceedings in the circuit court of appeals.[3] A sufficient number of the printed copies of this record (not less then ten) must also be furnished to supply the court. These printed copies may usually be obtained from the clerk of the circuit court of appeals. In case they can not be so obtained the record must be reprinted under the supervision of the clerk of the supreme court. In such cases it is usually desirable to print at least fifty copies, in order that there may be a sufficient number for use on the final hearing, should the petition be granted.

Some Monday should be fixed for the submission of the petition, that being motion day. Sufficient notice must be given counsel for the respondent of the day selected to enable them to file briefs in opposition, if they desire to do so. Proof of service of such notice must be filed in the clerk's office. The petition must be called up and submitted in open court

[1] In The Conqueror, 166 U. S. 114, 41 L. Ed. 937, the supreme court said: "While we think such application should be made with reasonable promptness, as it was made during the term and within a year after the original decree, we think it was within the time. We do not think the party complaining is limited to the six months allowed by Sec. 11 of the court of appeals act for suing out of a writ of error from the court of appeals to review the judgment of the district or circuit court; and it would seem that he is, by analogy, entitled to the year within which, by Sec. 6, an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review."

[2] See Form No. 109, *post.*

[3] Supreme Court Rule 37.

by counsel. The application is submitted on briefs. Oral arguments are not permitted.

Although invested with a power so broad and comprehensive, and has been sparingly exercised. The supreme court has said that writs of *certiorari* will be allowed "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." [4]

These rules were rigidly adhered to by the supreme court for several years. In the words of Mr. Justice Brewer, the supreme court, "while not doubting its power, has been chary of action in respect to *certioraries*." [5] Of the many applications which have been more recently made to the supreme court, comparatively few have been granted, yet that court appears to be much more liberal of late in granting such writs than formerly.[6] A writ of certiorari will be granted to bring up a case in which one member of the circuit court of appeals sat on the trial or hearing of the same case or question in the district court.[7]

[4] Mr. Justice Brewer, in Forsyth v. Hammond, 166 U. S. 514, 41 L. Ed. 1095. Consult also Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 383, 37 L. Ed. 486; Lau Ow Bew v. U. S., 144 U. S. 58, 36 L. Ed. 340; *In re* Woods, 143 U. S. 202, 36 L. Ed. 125; Lau Ow Bew, petitioner, 141 U. S. 583, 35 L. Ed. 868; The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

[5] Forsyth v. Hammond, 166 U. S. 513, 41 L. Ed. 1095. Consult also cases reported in 163 U. S., pp. 675 to 712. Lau Ow Beu, 141 U. S. 583, 35 L. Ed. 868; *In re* Woods, 143 U. S. 202, 36 L. Ed. 125; Chicago & Northwestern Ry. Co. v. Osborne, 146 U. S. 354, 36 L. Ed. 1002; Hendry v. Ocean Steamship Co., 164 U. S. 707.

[6] Writs of *certiorari* have been granted to remove bankruptcy cases from the circuit court of appeals in Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

[7] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 386, 37 L. Ed. 486.

When a writ of *certiorari* is granted it is issued by the clerk of the supreme court and sent to the clerk of the circuit court of appeals from which the case is to be removed. A return to such writ is ordinarily made pursuant to a stipulation of counsel filed in the office of the clerk of the circuit court of appeals. The stipulation is in effect an agreement that the transcript of record filed with the application for the writ may be taken as a return to the writ and no new transcript made. The clerk returns the writ by endorsing thereon a copy of the stipulation. This writ is returned to the office of the clerk of the supreme court, and the case is then pending in the supreme court, upon the writ of certiorari. The questions arising upon the record are determined according to fixed rules of law.[8] A case so removed to the supreme court is pending there as if on the appeal of the petitioner, and only his assignments of error will be considered by that court,[9] unless the respondent also applies for *certiorari*. The burden is upon the petitioner, and he is allowed to open and close the argument, as in the case of an appeal.

Whenever a case has been reviewed and determined by the supreme court on a writ of *certiorari* to a circuit court of appeals, the mandate issues directly to and the cause is remanded to the proper district or circuit court for further proceedings in pursuance of such determination.[10]

§ 309. Certifying questions to the supreme court.

The provisions of the bankrupt statute, with reference to certifying questions to the supreme court from other courts of the United States and giving the supreme court power to exercise jurisdiction of such matters, manifestly adopt the same rule with reference to certifying questions in bankruptcy cases, that applies to certificates in other cases.[1]

It therefore becomes necessary to examine the United

[8] Amer. Const. Co. v. Jacksonville Ry. Co., 148 U. S. 372, 37 L. Ed. 486.

[9] Hubbard v. Tod, 171 U. S. 474, 43 L. Ed. 246.

[10] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 10.

[1] B. A. 1898, Sec. 25*d*. See Loveland's Forms Fed. Prac., Nos. 1431 to 1435, and notes thereto.

States laws now in force with reference to such certificates. The supreme court is the only court to which questions may be certified. The Revised Statutes of the United States provided for certifying questions to the supreme court in certain cases where there was a division of opinion between the judges holding the inferior court.[2] These sections, however, were repealed by the circuit court of appeals act.[3] The only provisions now in force for certifying questions to the supreme court for its action are found in the act creating the circuit court of appeals.[4] This act provides for a certificate in two classes of cases. *First*, a certificate from a district or circuit court with reference to the jurisdiction of that court; and, *second*, a certificate from a circuit court of appeals of any question or proposition of law concerning which that court desires the instruction of the supreme court.

First: Certifying Jurisdictional Questions.—Section 5 of the court of appeals act[5] provides that in any case in which the jurisdiction of a district or circuit court is in issue the question of jurisdiction alone may be certified from the court below to the supreme court for decision.

This provision applies to the jurisdiction of district courts, and will therefore include the jurisdiction of that court with reference to bankruptcy cases. It relates only to cases where the question is as to the jurisdiction of courts of the United States as such.[6] It must be a question of federal jurisdiction of the court of bankruptcy and not a question of whether that court has jurisdiction in bankruptcy to make the order complained of.[7] Such orders are reviewable in a circuit court of appeals on petition to review.[8]

[2] R. S. Secs. 650-651-652-693-697.

[3] March 3, 1891, 26 Stat. at L. 826, Sec. 12; U. S. v. Rider, 163 U. S. 132, 41 L. Ed. 101; U. S. v. Hewecker, 164 U. S. 46, 41 L. Ed. 345.

[4] Act of March 3, 1891, 26 Stat. at L. 826. See Sec. 302, *ante*.

[5] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 5. This section is printed in full in Sec. 302, *ante*.

[6] Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144.

[7] Denver Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127; Lucius v. Cawthon-Coleman Co., 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.

[8] Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786; Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144.

In order to take advantage of this provision a case is removed to the supreme court of the United States direct from the district court on writ of error or appeal as in other cases. The record must contain a certificate from the court below specifying the question of jurisdiction involved which was the ground of the decision of that court.[9] Where the record shows that the only matter tried and decided in the court below and the petition for writ of error or appeal asked only for the review of the judgment on the jurisdictional question, it has been held to be a sufficient certificate.[10] The certificate must be granted during the term at which the judgment or decree was entered.[11]

The application for a certificate of the question of jurisdiction is made to the district court. It is a matter of right and not of judicial discretion.

Such cases are entitled to be advanced to the supreme court on motion.[12]

Second: Certifying Questions of Law from Circuit Courts of Appeals.—Section 6 of the circuit court of appeals act[13] provides "that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the

[9] Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144; Denver Nat. Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127; Davis v. Geisler, 162 U. S. 290, 40 L. Ed. 972.

[10] Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 285, 46 L. Ed. 910; Interior Const. & Imp. Co. v. Gibney, 160 U. S. 217, 40 L. Ed. 401; Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660; Smith v. McKay, 161 U. S. 355, 40 L. Ed. 731.

[11] The Bayonne, 159 U. S. 687, 40 L. Ed. 306; Colvin v. Jacksonville, 158 U. S. 456, 39 L. Ed. 1053.

[12] Sup. Ct. Rule 32.

whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." [13]

It should be observed that the questions to be certified under this provision rest within the discretion of the circuit court of appeals. It is not a discretion the exercise of which may be invoked by a party as of right. The certification is for the instruction of the court upon doubtful questions. In cases of magnitude and upon indirect and doubtful questions of law the court, upon the argument, may properly indulge the suggestion of counsel as to the desirability of the advice and instruction of the supreme court. It is not, however, good practice to file a motion for a certificate, nor will the court usually grant such a motion.[14] Unless the circuit court of appeals is in doubt with reference to some question of law, and asks for information, the supreme court will not entertain the certificate.[15] The circuit court of appeals will not ordinarily certify a question in advance of the argument,[16] nor after it has decided the case.[17] The circuit court of appeals may certify certain questions in a case and file an opinion on other points in the same case.[18] In such cases the final decree or judgment will await the decision of the supreme court.

In certifying a question or proposition of law to the supreme court the certificate should be entitled in the circuit court of appeals, and should contain such a statement of the facts as may be necessary to the determination of the questions of law certified. It should not contain the whole record.

A certificate should not in effect certify the whole case to

[13] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 6.

[14] Louisville, etc., Ry. Co. v. Pope, 74 Fed. Rep. 1; Andrews v. National Foundry & Pipe Works, 77 Fed. Rep. 774; Pullman Palace Car Co. v. Central Transportation Co., 83 Fed. Rep. 1.

But see Farmers & Merchants State Bank v. Armstrong, 49 Fed. Rep. 600.

[15] Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445.

[16] Louisville, etc., Ry. Co. v. Pope, 74 Fed. Rep. 1.

[17] The Majestic, 69 Fed. Rep. 844.

[18] Sigafus v. Porter, 84 Fed. Rep. 430; McCormick Harvesting Machine Co. v. Aultman, 69 Fed. Rep. 371; Compton v. Jesup, 68 Fed. Rep. 263, s. c. on Certificate, 167 U. S. 1, 42 L. Ed. 55.

the supreme court, but only certain questions or propositions of law, unmixed with questions of fact or of mixed law and fact.[19] The certificate should show that the instructions of the supreme court are desired in the particular case upon a particular question as to the proper decision.[20] The questions propounded should present distinct points or propositions clearly stated so that each can be distinctly answered without reference to other issues of law involved in the case.[21]

The certificate should be signed by the judges constituting the circuit court of appeals sitting in the particular case. The clerk of the circuit court of appeals attaches to this certificate a certificate to the effect that the certificate was duly filed and entered of record in the clerk's office by order of the court, and, as directed by the court, the certificate is forwarded to the supreme court for its action thereon.

The certificate, including a statement of facts, is transmitted to the clerk of the supreme court and filed and docketed by him. The case is set down for argument upon the certificate like a case upon an appeal or writ of error. Counsel are permitted to file briefs and make oral arguments.

Upon the determination of the supreme court a certificate of its answers to the propositions of law, under the hand and seal of the clerk of the supreme court, is sent to the circuit court of appeals. In case the circuit court of appeals has decided the other questions at issue in the case, a decree may be usually entered upon the certificate without further argument. In case the circuit court of appeals desires further argument, it may order the whole case reargued in view of the certificate of the supreme court. In any case the final decree is entered in the circuit court of appeals from which the question was certified.

[19] Cross v. Evans, 167 U. S. 60, 42 L. Ed. 77; Graver v. Faurot, 162 U. S. 435, 40 L. Ed. 1030; U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 42 L. Ed. 559; Warner v. New Orleans, 167 U. S. 467, 42 L. Ed. 239.

[20] Columbus Watch Co. v. Robbins, 148 U. S. 266, 37 L. Ed. 445.

[21] U. S. v. Union Pac. Ry. Co., 168 U. S. 505, 42 L. Ed. 559; McHenry v. Alford, 168 U. S. 651, 42 L. Ed. 614; Warner v. New Orleans, 167 U. S. 467, 42 L. Ed. 239.

§ 310. Appeals to the supreme courts of the territories.

The supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.[1]

Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the supreme court of the territories in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.[2]

Such appeal must be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.[2] The appeal is allowed by a judge of the court appealed from or of the court appealed to, and is regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.[3]

A petition to revise under Section 24*b* lies to the circuit court of appeals within whose jurisdiction the territorial court happens to be and not to the supreme court of the territory.[4]

§ 311. The threefold jurisdiction of the circuit courts of appeals.

The bankrupt statute confers upon the circuit courts of appeals power to revise the orders and decrees of a court of bankrutpcy in three different classes of proceedings, as follows. *First,* it invests these courts with jurisdiction in

[1] B. A. 1898, Sec. 24*a*. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

[2] B. A. 1898, Sec. 25*a*. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

[3] Gen. Ord. 36. Consult also Secs. 315 *et seq., post.*

[4] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

equity, "either interlocutory or final, to superintend and revise any matter of law in the proceedings of the several inferior courts of bankruptcy within their jurisdiction";[1] *second*, it invests these courts with appellate jurisdiction, as in equity, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over;[2] and, *third*, it vests these courts with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy over which they have appellate jurisdiction in other cases.[3]

In the first case the appellate court acts not upon appeal, but by a petition of a complaining party, and is given authority to review and revise a matter of law only in the proceedings of the bankrupt court that is complained of. In the second case the review is as in equity, which may rest upon a question of fact or a question of law, or both. In the third case the review is on writ of error or appeal to review the decision of a court of bankruptcy in a controversy arising in bankruptcy proceedings in the exercise by that court of the jurisdiction, vested in it at law and in equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto. Such controversies are not in any way peculiar to bankruptcy, but such as arise at common law or in equity.

In some cases the moving party, being uncertain as to the nature of his remedy, has both appealed and filed a petition for review and allowed the court to select the proper proceeding and dismiss the other.[4] It has been held that an appeal

[1] B. A. 1898, Sec. 24*b*. See Sec. 312, *post*.

[2] B. A. 1898, Sec. 25*a*. See Sec. 314, *post*.

[3] B. A. 1898, Sec. 24*a*. See Sec. 302*a*, *ante*.

[4] *In re* County of Worcester, 102 Rep. 808, 4 Am. B. R. 496; *In re* Fisher, 103 Fed. Rep. 860, 4 Am. B. R. 646; *In re* Dickson, 111 Fed. Rep. 726, 7 Am. B. R. 186; Hutchinson v. LeRoy, 113 Fed. Rep. 202, 8 Am. B. R. 20. See Sec. 301*a*, *ante*.

may be treated as a petition for review when only a question of law is presented,[5] but not where questions of fact and law are both involved in the appeal.[6]

§ 312. The supervisory jurisdiction of the circuit courts of appeals.

The several circuit courts of appeals have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.[1] A similar power was conferred upon circuit courts by the act of 1867 [2] and by the act of 1841.[3]

A circuit court of appeals has power to revise, as to matters of law under Section 24*b* the decision of a territorial court which happens to be within its jurisdiction.[4]

The provision of the present statute confers a complete supervision in matters of law over all the proceedings of the court of bankruptcy within the limits specified. It extends not only to all cases, but to all questions arising under the statute; in other words, the circuit court of appeals may review the whole case after a final decree and decide upon it, or it may assume jurisdiction of any particular proceeding or order arising in the progress of the case. The power is expressly extended to "interlocutory or final" orders or decrees.

Whether the supervisory power of a circuit court of appeals under Section 24*b* extends to any proceeding in a court of bankruptcy in the exercise of the jurisdiction vested in it

[5] Chesapeake Shoe Co. v. Seldner (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 10 Am. B. R. 466; *In re* Abraham (C. C. A. 5th Cir.), 93 Fed. Rep. 767, 784, 2 Am. B. R. 266, s. c. 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623, as explained in Holden v. Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, 10 Am. B. R. 786.

[6] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; Dickas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 15 Am. B. R. 566; Davison v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 15 Am. B. R. 489. See also Sec. 301*a*, *ante*.

[1] B. A. 1898, Sec. 24*b*.

[2] R. S. Sec. 4986.

[3] 5 Stat. at L. 440, Sec. 6.

[4] Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992.

at law and in equity as well as in bankruptcy proper is not settled. The great weight of authority at present is to the effect that the revisory jurisdiction is confined to proceedings in bankruptcy proper and does not include orders in cases, where the final decree or judgment can be reviewed on appeal.[5] The circuit courts of appeals do not appear to have so restricted this revisory jurisdiction in the early cases. They entertained petitions for revision in many cases to review judgments in bankruptcy proceedings proper from which an appeal lay, as well as interlocutory orders and final decrees on intervening petitions in equity.[6] The objection that

[5] For a discussion of this subject see Sec. 301*a*, *ante*.

In re Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595. But see *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689.

[6] *In re* Holmes (C. C. A. 8th Cir.), 142 Fed. Rep. 391, 15 Am. B. R. 689, the court cites an instance of the exercise of its revisory jurisdiction to review a judgment refusing to adjudge the defendant a bankrupt, which was clearly appealable under Section 25*a*, in the following language: "In the year 1903, an original petition to revise in matter of law proceedings of the district court of Kingfisher county, Okl., which culminated on April 6, 1903, in an order which dismissed an involuntary petition in bankruptcy was presented to this court. The order of the district court was a 'judgment refusing to adjudge the defendant a bankrupt,' it was appealable under Bankr. Act July 1, 1898, c. 541, § 25*a*, 30 Stat. 553, and an appeal from it would have brought up for review all the preceding rulings in the case. This court certified these facts to the supreme court, and inquired whether it had jurisdiction to superintend and revise, in matter of law, these proceedings in the district court of Kingfisher county, and the supreme court answered in the affirmative. The fact that the only real object of the petition in that case was to reverse the judgment refusing to adjudge the defendant a bankrupt was disclosed by the certificate to the supreme court and appears in the report of the case. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 48 L. Ed. 992. After the rendition of this decision this court proceeded upon the original petition for revision to review and reverse the judgment of the district court of Kingfisher county and to direct it to take farther proceedings in the case. *In re* Plymouth Cordage Co., 135 Fed. Rep. 1000, 13 Am. B. R. 665."

In re Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 11 Am. B. R. 539, the circuit court of appeals reviewed an order denying a discharge on petition to review.

In re Ellis (C. C. A. 6th Cir.),

these courts had no revisory jurisdiction in such cases does not appear to have been brought to the attention of the court. Questions of law arising in the process of a jury trial in bankruptcy can not be reviewed under this provision, but only on writ of error.

The revisory jurisdiction does not include a review of orders made by a referee.[8] To review an order of a referee a certificate must be taken from the referee to the district judge and the matter passed upon by him. This order may then be reviewed by a circuit court of appeals.[9]

This power is not to be exercised by the appellate court until after the action of the court of bankruptcy. The power to superintend and revise extends only to questions and matters which have been fairly presented to and passed upon by the court of bankruptcy.[10] An action of the court of bankruptcy which is purely discretionary will not be revised by an appellate court unless clearly an abuse of discretion.[11]

The exercise of such revisory power does not operate to transfer the entire proceedings into the circuit court of appeals, to be there continued as in a court of the first instance. Its jurisdiction is appellate and not original. Where the decree or order is affirmed, it stands as a decree or order of the court of bankruptcy, and is to be carried into due execution by that court.

143 Fed. Rep. 103, 16 Am. B. R. 221, an interlocutory order holding a petitioning creditor to have a provable claim, but not adjudging the defendant to be a bankrupt was reviewed on petition for revision.

[7] Elliott v. Toeppner, 187 U. S. 329, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1.

[8] *In re* Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 757.

[9] As was done in Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[10] Godshalk Co. v. Sterling (C. C. A. 3d Cir.), 129 Fed. Rep. 580, 12 Am. B. R. 302; *In re* Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 12 Am. B. R. 248.

[11] *In re* Brown (C. C. A. 5th Cir.), 112 Fed. Rep. 49, 7 Am. B. R. 252; *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; *In re* Levi & Klauber (C. C. A. 7th Cir.), 142 Fed. Rep. 962, 15 Am. B. R. 294.

It should be observed, also, that the supervisory power of the appellate courts extends only to matters of law.[12] They can not superintend or revise matters of fact or mixed matters of fact and law.[13] In this respect the present statute differs from the act of 1867. Although the former act provided for revising matters of fact as well as points of law, it is noticeable that under the act the questions presented were generally mere points of law. There were a few cases in which evidence was admitted in the circuit courts.[14] It is clear that such proceeedings can not be had under the present act. If no question of law is presented by the petition it should be dismissed.[15]

In the exercise of the revisory jurisdiction under Section 24*b* the circuit court of appeals have reviewed an order of a court of bankruptcy giving or refusing priority of claims irrespective of the value,[16] or with reference to claims for exemptions,[17]

[12] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Courier-Journal Job Printing Co. v. Brewing Co., 101 Fed. Rep. 699, 4 Am. B. R. 183. *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; Kenova Loan & Trust Co. v. Graham (C. C. A. 4th Cir.), 135 Fed. Rep. 717, 14 Am. B. R. 313.

[13] *In re* Purvine (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 2 Am. B. R. 787; *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[14] Langley v. Perry, No. 8667 Fed. Cas., 2 N. B. R. 506; Farrin v. Crawford, No. 4686 Fed. Cas., 2 N. B. R. 602; *In re* Alexander, No. 160 Fed. Cas., Chase, 295. But see *In re* Great Western Tel. Co., No. 5739 Fed. Cas., 5 Biss. 359; First Nat. Bank of Troy v. Cooper, 20 Wall. 171, 22 L. Ed. 273.

[15] Ellis v. Kruliewitch (C. C. A. 8th Cir.), 141 Fed. Rep. 954, 15 Am. B. R. 615; *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; *In re* Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 757.

[16] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234. See also Morgan v. First Nat. Bank (C. C. A. 4th Cir.), 145 Fed. Rep. 466, 16 Am. B. R. 639.

[17] Bashinski v. Talbott (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 9 Am. B. R. 513; *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 9 Am. B. R. 689; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; *In re* Holden (C. C. A. 9th Cir.), 113 Fed. Rep. 141, 7 Am. B. R. 615; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 15 Am. B. R. 486.

or refusing to stay proceedings in a state court,[18] or to vacate and set aside an order setting aside a discharge and to reinstate the discharge,[19] or refusing to enjoin the bankrupt from prosecuting a second application for his discharge,[20] or refusing to reconsider a decision allowing claims and for the recovery of dividends,[21] or to sell the property of an adverse claimant,[22] or refusing to allow a creditor to amend his specification in opposition to a bankrupt's discharge,[23] or that a party to a bankruptcy proceeding is guilty of contempt in refusing to obey an order of the court,[24] or directing the trustee to return certain property to persons claiming it, which property was claimed by the trustee to be a part of the bankrupt's estate,[25] or directing a payment to the trustee in bankruptcy of a sum of money,[26] or allowing an amendment to an involuntary petition,[27] or directing an officer of the court to take possession of the bankrupt's property including that which was found in the custody of a third party and was claimed

[18] *In re* Kanter & Cohen (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 9 Am. B. R. 372; *In re* Seebold (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 5 Am. B. R. 358; White v. Thompson (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 9 Am. B. R. 653; *In re* San Gabriel Sanitorium Co. (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 7 Am. B. R. 206.

[19] *In re* Hawk (C. C. A. 8th Cir.), 114 Fed. Rep. 916, 8 Am. B. R. 71.

[20] *In re* Feigenbaum (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 9 Am. B. R. 595.

[21] *In re* Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 1, 9 Am. B. R. 368.

[22] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762. See also Sturgiss v. Corbin (C. C. A. 4th Cir.), 141 Fed. Rep. 1, 15 Am. B. R. 543; *In re* McMahon (C. C. A. 6th Cir.), 147 Fed. Rep. 685.

[23] *In re* Carley (C. C. A. 3d Cir.), 117 Fed. Rep. 130, 8 Am. B. R. 720; Kentucky Nat. Bank v. Carley (C. C. A. 3d Cir.), 121 Fed. Rep. 822, 10 Am. B. R. 375.

[24] Carling v. Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 8 Am. B. R. 29; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

[25] *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149.

[26] Hutchinson v. LeRoy (C. C. A. 1st Cir.), 113 Fed. Rep. 202, 8 Am. B. R. 20.

[27] *In re* Sears (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 8 Am. B. R. 713.

adversely,[28] or determining whether a preference must be surrendered or not before proving claim,[29] or determining conflicting claims to property in the possession of a court of bankruptcy,[30] or ascertaining and liquidating liens,[31] or to enjoin execution in a state court against a trustee,[32] or to set aside an order of dismissal and to reinstate an involuntary petition,[33] or sustaining demurrer to petition filed for the purpose of vacating an adjudication in bankruptcy,[34] or to sell property of the bankrupt free from liens,[35] or requiring the bankrupt or other person to surrender to the trustee property alleged to be in his possession belonging to the estate in bankruptcy,[36] or as to the vacating of an adjudication upon a judgment lien under Section 67*f*,[37] or requiring the surrender of property by an assignee for the benefit of creditors,[38] or requiring a bankrupt to endorse a liquor license for sale,[39] or to remove a trustee,[40] or with reference to the extradition of bank-

[28] *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 7 Am. B. R. 14.

[29] *In re* Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186; *In re* Abraham Steers Lumber Co. (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 7 Am. B. R. 332.

[30] *In re* Lemmon & Gale Co. (C. C. A. 6th Cir.), 112 Fed. Rep. 296, 7 Am. B. R. 291; Morgan v. First Nat. Bank (C. C. A. 4th Cir.), 145 Fed. Rep. 466, 16 Am. B. R. 039.

[31] *In re* Shirley (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 7 Am. B. R. 299; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 7 Am. B. R. 369; *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542.

[32] *In re* Neely (C. C. A. 2d Cir.), 113 Fed. Rep. 210, 7 Am. B. R. 312.

[33] *In re* Jemison Mercantile Co. (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 7 Am. B. R. 588.

[34] *In re* Ives (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 7 Am. B. R. 692.

[35] *In re* Union Trust Co. (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 9 Am. B. R. 767; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383.

[36] Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re* Purvine, 96 Fed. Rep. 192, 2 Am. B. R. 787.

[37] *In re* Richards, 96 Fed. Rep. 935, 3 Am. B. R. 145; *In re* Beaver Coal Co., 113 Fed. Rep. 889, 7 Am. B. R. 542.

[38] *In re* Gutwillig, 92 Fed. Rep. 337, 1 Am. B. R. 388; Davis v. Bohle, 92 Fed. Rep. 325, 1 Am. B. R. 412; *In re* Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

[39] *In re* Fisher, 103 Fed. Rep. 860, 4 Am. B. R. 646.

[40] *In re* Perkins, No. 10982 Fed Cas., 5 Biss. 254.

rupt,[41] or appointing trustee when creditors fail to elect one,[42] or an order removing a proceeding in involuntary bankruptcy to another district.[43]

§ 313. Application to superintend and revise matters of law.

The supervisory power of the circuit courts of appeals is exercised on due notice and petition by a party aggrieved.[1]

The exercise of this general jurisdiction is not placed by the act under specified regulations and restrictions, like the proceeding by appeal or writ of error.[2] Congress has left these regulations to the discretion of the circuit courts of appeals, and to the rules to be prescribed by the supreme court. As yet the supreme court has prescribed no rules concerning it. Until it does, the circuit court of appeals may prescribe rules and regulations, so far as they do not conflict with the statute.

The act prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days.[3] Not so with a petition for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the act nor any rule of the supreme court determines what that time is. It must, therefore, be left to depend upon the circumstances of each case. It should generally be fixed by analogy in the period designated within which appeals must be taken.[4]

[41] *In re* Hassenbusch (C. C. A. 6th Cir.), 108 Fed. Rep. 35, 47 C. C. A. 177.

[42] *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 5 Am. B. R. 155.

[43] Kyle Lumber Co. v. Bush (C. C. A. 5th Cir.), 133 Fed. Rep. 688, 13 Am. B. R. 535.

[1] B. A. 1898, Sec. 24*b*.

[2] Mr. Justice Chase, in construing the act of 1867, *In re* Alexander, No. 160 Fed. Cas., Chase, 295.

[3] B. A. 1898, Sec. 25*a*.

[4] First Nat. Bank of Troy v. Cooper, 20 Wall. 171, 20 L. Ed. 273; *In re* Economical Printing Co. (C. C. A. 2d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 697; *In re* Good (C. C. A. 8th Cir.), 3 Am. B. R. 605, 99 Fed. Rep. 389; *In re* Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 757; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; *In re* Holmes (C. C. A. 8th Cir.),

The application for a review and revision of the action of a court of bankruptcy can be made only by a person aggrieved by such action.[5]

A second petition to review the same matter as a previous petition will not be permitted.[6]

§ 313a. Petition and record on revision.

The application for the exercise of supervisory power is made by petition.[1] The petition should be filed in the circuit court of appeals for the circuit in which the court of bankruptcy, whose action is to be reviewed, is held.[2] It is not necessary that a petition to revise be allowed by a judge of the appellate court or the court below, or that an appeal bond be given, or that a citation issue or a transcript of record in the court below filed.[3] The filing of a petition for revision is the beginning of an original proceeding in the circuit court of appeals, invoking the exercise of its appellate jurisdiction.

The petition should be entitled in the appellate court with the style of the case, and should state the proceedings in court of bankruptcy sufficient to show the jurisdiction of that court, and clearly and specifically point out the question of law decided by the district court and the particular error or errors of

142 Fed. Rep. 391, 15 Am. B. R. 689; *In re* Groetzinger & Sons (C. C. A. 3d Cir.), 127 Fed. Rep. 124, 11 Am. B. R. 467.

[5] B. A. 1898, Sec. 24*b*; Ala. & C. R. Co. v. Jones, No. 127 Fed. Cas., 7 N. B. R. 145; *In re* Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 4 Am. B. R. 778.

In Clark v. Pidcock (C. C. A. 3d Cir.), 129 Fed. Rep. 745, 12 Am. B. R. 309, the court said: "We are disposed, however, to give liberal construction to the language used here, and a doubt in regard to the same should be resolved in favor of the petitioner. The petitioner who invokes our jurisdiction under this section, was a judgment creditor of the bankrupt, and so scheduled by him in his bankruptcy petition. Whether he may or may not hereafter be allowed to prove his claim, he has an interest as a general creditor in the estate of the bankrupt."

[6] Beach v. Macon Grocery Co. (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 9 Am. B. R. 762.

[1] B. A. 1898, Sec. 24*b*.

[2] *In re* Williams, 105 Fed. Rep. 966, 5 Am. B. R. 198, note.

[3] Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 130 Fed. Rep. 396, 14 Am. B. R. 477.

law complained of, charging that the petitioner is aggrieved thereby, and praying the circuit court of appeals to review and revise the decision of the court below.[4]

It is not necessary to allege any value in relation to the question or matters concerning which a review is sought.[5]

The petition should be signed and verified by the petitioner, or his agent and attorney, if he has knowledge of the facts sufficient to make the affidavit.

All persons interested in the controversy should be made parties to the petition and have notice of the filing of it. Where the trustee represents the creditors in the bankruptcy court he only need be made party respondent in the circuit court of appeals.[6]

Petitions for review may be amended in the discretion of the court.[7]

The record of a petition for revision should consist of a certified copy of so much of the record as is necessary to exhibit the manner in which the question of law arose and its determination.[8] It has been held that the record should present to the appellate court simply, clearly and unequivocally the issues of law, to the like effect as bills of exceptions, proceedings without a jury and proceedings in the supreme court on admiralty appeals as provided in the act of February 16, 1875.[9] The record should ordinarily contain the order of the

[4] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145; *In re* Baker (C. C. A. 1st Cir.), 104 Fed. Rep. 287, 4 Am. B. R. 778; *In re* Seebold (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 5 Am. B. R. 358; *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417.

For form of petitions for review see Forms, Nos. 178 *et seq.*, *post.*

[5] *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234.

[6] *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383.

[7] Gen. Ord. 11. Knight v. Cheney, No. 7883 Fed. Cas., 5 N. B. R. 305; Littlefield v. Del. & Hud. Canal Co., No. 8400 Fed. Cas., 3 Cliff. 371.

[8] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145.

[9] *In re* Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 226, 11 Am. B. R. 97; *In re* Shoe & Leather Reporter (C. C. A. 1st Cir.), 129 Fed. Rep. 588, 12 Am. B. R. 248; *In re* O'Connell (C. C.

court of bankruptcy sought to be reviewed and other papers necessary to establish the allegations in the petition.[10] It should also include a statement of the findings of fact and conclusions of law by the court below, or something else as a substitute therefor, when evidence has been taken on issues of fact, and not a certified copy of the evidence itself.[11] A summary of evidence or finding of fact certified by the referee to the district judge is sufficient, unless a trial *de novo* is had by the district judge. The opinion of the court is not sufficient for this purpose, but may be referred to for the purpose of ascertaining what propositions of law governed the court in which the opinion was filed, or for the general purpose of determining whether the case went off on facts or law.[12]

In practice counsel orders such papers, exhibits and other proceedings from the clerk of the court of bankruptcy as he deems necessary for the consideration of the appellate court to determine the question of law involved. These papers are attached to and filed with the petition in the appellate court. If he fails to include any papers which the respondent considers necessary he my apply for a writ of *certiorari* to bring up such additional papers as he may wish.[13] If he shall insist upon including in the record unnecessary matter the court may prevent injustice being done the petitioner in dealing with the costs.

A. 1st Cir.), 137 Fed. Rep. 838, 14 Am. B. R. 237; *In re* Pettingill (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 575.

[10] *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 3 Am. B. R. 145.

[11] *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 13 Am. B. R. 417; Steiner v. Marshall (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 15 Am. B. R. 486; *In re* Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 757; *In re* Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 226, 11 Am. B. R. 97; *In re* O'Connell (C. C. A. 1st Cir.), 137 Fed. Rep. 838, 14 Am. B. R. 237.

[12] *In re* Pettingill & Co. (C. C. A. 1st Cir.), 137 Fed. Rep. 840, 14 Am. B. R. 757; *In re* Boston Dry Goods Co. (C. C. A. 1st Cir.), 125 Fed. Rep. 260, 11 Am. B. R. 97.

[13] See Sec. 306.

§ 313b. Proceedings on a petition to review and revise matters of law.

Upon filing a petition for review in a circuit court of appeals due notice must be given adverse parties.[1] The notice required may be given by the petitioner or his attorney or other person delivering a copy of the petition to the respondent and proof of service made either in the form of an affidavit or acceptance of service. The proof of service should be filed in the appellate court. The clerk of the appellate court may be requested to serve a copy of the printed petition upon the respondent or his attorney after the petition has been docketed and printed. This is sufficient notice, but the better practice is to serve a formal notice.[2] The service of a petition upon a person who acted as counsel for the respondent in the original proceedings is sufficient.[3]

The proceedings in review are a part of the original case, and for the purpose of review the parties are still in court. The proceeding in review is intended to be speedy and summary, and a reasonable notice to counsel accomplishes the ends of justice. A defective service is cured by appearance in the circuit court of appeals.[4]

Upon filing the petition the case is docketed, and the petition and exhibits printed as in other cases. The case is regularly heard upon the petition and exhibits filed therewith. The circuit court of appeals may direct certain original papers to be sent up, if necessary, to ascertain the facts. No answer is required to the petition, unless called for by a rule or order of court for the reason that the petition and exhibits must show the question of law to be reviewed.[5] No new evidence is introduced in the appellate court. The court of appeals acts

[1] B. A. 1898, Sec. 24*b*; *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Abraham, 93 Fed. Rep. 767, 2 Am. B. R. 266.

[2] For form of notice see Form No. 176, *post*.

[3] Ala. & C. R. Co. v. Jones, No. 126 Fed. Cas., 5 N. B. R. 97.

[4] Ala. & C. R. Co. v. Jones, No. 124 Fed. Cas., 5 N. B. R. 97.

[5] By rule of court the time to plead to a petition is limited in the circuit court of appeals for the 1st circuit. *In re* Baker, 104 Fed. Rep. 287, 4 Am. B. R. 778.

to review the question of law upon the statement of facts presented by the petition and papers before it. It is not proper to permit an issue of fact to be made. The appellate court revises only questions of law. The practice under the act of 1867 was somewhat different in this respect, for the reason that the circuit courts were authorized to examine both law and facts. It is the decision of the judge on the record before him and not the ruling of the referee that is brought into the appellate court for review.[6]

Counsel are permitted to file briefs and make arguments. The attorney for the petitioner opens and closes the argument. A supervisory petition will not ordinarily be advanced for hearing.

The order of the circuit court of appeals in such cases is regularly an affirmance, reversal or modification of the order of the court below, with such directions as justice may require. The appellate court does not execute the order, but by its mandate it directs the court of bankruptcy with reference to what should be done, as in the case of an appeal or writ of error.

No appeal lies to the supreme court from the decision of the circuit court of appeals upon a petition for review.[7] The only method of obtaining a revision of such decision by the supreme court is by a writ of *certiorari*.[8]

§ 314. Appellate jurisdiction in bankruptcy of the circuit courts of appeals.

As has been observed, the present statute does not affect the appellate jurisdiction of the circuit courts of appeals, either in equity or law cases.[1]

The appellate powers of the circuit courts of appeals, in bankruptcy, are contained in Section 25 of the act. They are "That appeals, as in equity cases, may be taken in bank-

[6] Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694.

[7] Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786.

[8] See Writs of *certiorari*, Sec. 307, *ante*.

[1] See Secs. 301*a*, 302 and 302*a*, *ante*.

ruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

Unless a case falls within one of these three classes it can not be reviewed on appeal.[2] Thus no appeal lies from an interlocutory order made during the examination of a bankrupt requiring him to produce books,[3] or a decree in a suit to recover property from the trustee as property that belonged to the plaintiff and not to the bankrupt's estate.[4] Where a case falls within one of these provisions the review should be by appeal and not by invoking the supervisory powers of the circuit court of appeals,[5] or suing on a writ of error.[6]

[2] In First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the court said: "And in any view, the proceeding was a proceeding in bankruptcy. Being such, an appeal from the decree of the district court under Section 25*a* did not lie, and parties aggrieved could only invoke the supervisory power under Section 24*b*."

See also Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 14 Am. B. R. 780; Goodman v. Brenner (C. C. A. 5th Cir.), 109 Fed. Rep. 481, 6 Am. B. R. 470; *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198; Fisher v. Cushman (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 4 Am. B. R. 646; Hutchinson v. Le Roy (C. C. A. 1st Cir.), 113 Fed. Rep. 202, 8 Am. B. R. 20.

[3] Goodman v. Brenner (C. C. A. 5th Cir.), 109 Fed. Rep. 481, 6 Am. B. R. 470.

[4] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198.

[5] *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605; *In re* Dickson (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 7 Am. B. R. 186.

Consult *In re* Rouse, Hazard & Co., 91 Fed. Rep. 96, 1 Am. B. R. 234, in which the court held that the case presented was not within the appellate, but properly in the supervisory, jurisdiction, and that if it had been a proceeding in which an appeal would lie, it said: "We should be wholly without jurisdiction." See Sec. 312, *ante*.

[6] Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 12 Am. B. R. 497.

But see Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1.

First. From a Judgment Adjudging or Refusing to Adjudge the Defendant a Bankrupt.—It seems that an appeal under this clause lies only in involuntary proceedings because the word "defendant" implies that the proceeding is instituted against the debtor by his creditors. A creditor is not permitted to contest an adjudication in voluntary bankruptcy [7] and could not therefore be aggrieved by a decision either refusing or making an adjudication. Whether the bankrupt would be permitted to review on appeal a judgment refusing an adjudication on his petition is very doubtful.

It is clear that an appeal in an ordinary involuntary proceeding may be taken by either the petitioning creditors or the bankrupt to review a judgment either refusing or making an adjudication.[8] An appeal lies from such judgment, although only questions of law are presented for review.[9] It has been held that an appeal will not lie from an order dismissing a petition for intervention by a creditor for the purpose of a rehearing to oppose the adjudication.[10] An assignee for the benefit of creditors, who has intervened to contest the petition, has a right to appeal from the decree adjudging the defendant to be bankrupt.[11]

An order making or refusing to make an adjudication in bankruptcy can not be reviewed on writ of error [12] unless there is a trial by jury.[13]

[7] *In re* Jehu, 94 Fed. Rep. 638, 2 Am. B. R. 498.

[8] Simonson v. Sinsheimer (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 3 Am. B. R. 824; Parmenter Mfg. Co. v. Stoever (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 Am. B. R. 220; West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

See also Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1.

[9] Taft Co. v. Century Savings Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 594.

[10] *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441.

[11] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

[12] Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 12 Am. B. R. 497.

[13] Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Bower v. Holzworth (C. C. A. 8th Cir.), 138 Fed. Rep. 28, 15 Am. B. R. 22. Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1.

Second. From a Judgment Granting or Denying a Discharge.—It is clear that under this clause a creditor or the bankrupt may appeal from the judgment of the court of bankruptcy either granting or refusing a discharge to the bankrupt in voluntary or involuntary proceedings.[14] A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect.

It has been held that an appeal lies from an order refusing to confirm a composition of creditors on the ground that this is in effect refusing a discharge.[15] An appeal lies from an order dismissing an application for discharge for want of prosecution, because such an order is in effect one denying a discharge.[16]

Third. From Judgments Allowing or Rejecting Claims.—A judgment allowing or rejecting a debt or claim of a creditor against the estate of the bankrupt may be reviewed on appeal provided the sum in controversy amounts to five hundred dollars or over.[17] This applies to voluntary and involuntary proceedings. "A debt or claim of five hundred dollars or over" refers to a debt or claim attempted to be proved in the bankruptcy proceedings against the bankrupt's estate for the purpose of receiving a dividend and does not include all debts or claims arising in the administration

[14] *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Feldstein (C. C. A. 2d Cir.), 115 Fed. Rep. 259, 8 Am. B. R. 160; *In re* Gaylord (C. C. A. 2d Cir.), 112 Fed. Rep. 668, 7 Am. B. R. 1.

[15] U. S. v. Hammond (C. C. A. 6th Cir.), 104 Fed. Rep. 862, 4 Am. B. R. 736, overruling *In re* Adler, 103 Fed. Rep. 444, 4 Am. B. R 583; Marshall, Field & Co. v. Wolf & Bro. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 13 Am. B. R. 595. But see Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[16] *In re* Kuffler (C. C. A. 2d Cir.), 127 Fed. Rep. 125, 11 Am. B. R 469.

[17] B. A. 1898, Sec. 25.

of the bankrupt's estate.[18] It includes an attorney's fee [19] and also a claim proved as a secured debt.[20] It does not include claims for services rendered or expenses incurred in the administration of the estate.[21] The debt must be provable at the date of bankruptcy. Where an appeal is founded upon a claim or debt, the circuit court of appeals may determine as incident thereto the question of the validity and priority of such claim in connection with a lien or other security of the same.[22] Where the amount allowed or rejected is less than five hundred dollars and no appeal lies.[23]

Where a claim is disallowed the creditor owning the claim may prosecute an appeal. Where a claim is allowed the trustee representing all of the creditors is the proper person to prosecute the appeal.[24] It has been held that a creditor may appeal from the allowance of a claim of another creditor

[18] *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 5 Am. B. R. 198. Davidson & Co. v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 15 Am. B. R. 489.

In Holden v. Stratton, 191 U. S. 115, 48 U. Ed. 116, 10 Am. B. R. 786, the Chief Justice said: "While the word 'claim' is used in its signification of the demand or assertion of a right in subd. 11 of Section 2, in respect of 'all claims of bankrupts to their exemptions,' it is also used in many parts of the act, and, as we think, in Section 25, as referring to debts . . . . presented for proof against estates in bankruptcy."

[19] *In re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; Randolph v. Scruggs, 190 U. S. 533, 42 L. Ed. 1165, 10 Am. B. R. 1.

[20] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; Randolph v. Scruggs, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1. Pratt v. Bothe (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 12 Am. B. R. 529.

[21] Davidson & Co. v. Friedman (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 15 Am. B. R. 489.

[22] Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 4 Am. B. R. 192; Hutchinson v. Otis, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496; Burow v. Grand Lodge, etc. (C. C. A. 5th Cir.), 133 Fed. Rep. 708, 13 Am. B. R. 542.

[23] Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 14 Am. B. R. 780.

[24] Foreman v. Burleigh (C. C. A. 1st Cir.), 109 Fed. Rep. 313, 6 Am. B. R. 230; Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 30; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313.

in case the trustee refuses to appeal.[25] A better practice is for the dissatisfied creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee.[26]

§ 314a. Cross appeals.

It is sometimes necessary for an appellee to prosecute an appeal in order to obtain relief in the appellate court.[1] This is called a cross-appeal. An appellee is entitled to urge any ground in the appellate court to support the decree below, but if he feels aggrieved by any portion of the decree, it is necessary for him to prosecute an independent appeal, with assignment of errors, citation and bond, in the same manner and within the time allowed for prosecuting an appeal for the purpose of correcting the decree in this respect.[2] One record will be sufficient ordinarily for both appeals. A cross-appeal may be sued out after record lodged in the appellate court on the original appeal.

§ 314b. Writs of error.

A judgment in a controversy at law arising in bankruptcy may be reviewed on writ of error in the same manner as any other judgment at law.[1]

It will be observed that there is no provision in the act for reviewing a proceeding in bankruptcy proper on a writ of error. The act provides for jury trials in certain cases,[2] which may result in a judgment adjudging or refusing to adjudge a defendant a bankrupt. There may be also a jury trial with reference to the facts in connection with the application for a

[25] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685; Ohio Valley Bank v. Mack (C. C. A. 6th Cir.), 149 Fed. Rep. ——.

[26] Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685.

[1] McGahan v. Anderson (C. C. A. 4th Cir.), 7 Am. B. R. 641, 113 Fed. Rep. 115.

[2] Farrar v. Churchhill, 135 U. S. 609-612, 34 L. Ed. 246.

[1] B. A. 1898, Sec. 24*a*.

[2] B. A. 1898, Sec. 19.

discharge, and possibly with reference to allowing or rejecting a debt. The question therefore arises when such jury trial is had, as to the manner of reviewing the judgment in such cases.

Where a party demands a trial by jury as of right in a bankruptcy proceeding under Section 19 it is a jury trial according to the common law.[3] Two methods only were known to the common law to re-examine a jury trial, namely, *first,* to grant a new trial by the court where the issue was tried, or to which the record was returnable, or, *second,* to award a *venire facias de novo* by an appellate court for some error of law which intervened in the proceeding.[4] It is settled that rulings made during the course of a trial by jury under Section 19 in a bankruptcy proceeding can be reviewed only on writ of error.[5] But where a person waives his statutory right to a jury trial, by failing to apply for a jury in writing, and the issues are submitted to a jury, the verdict returned is advisory as in equity. The decree of the trial court in such cases may be reviewed on appeal.[6]

An application for a writ of error is regularly made by filing a petition for the writ together with an assignment of errors in the clerk's office. This should be done before it is presented to the judge,[7] who regularly allows the writ, fixes the amount of the bond and signs a citation. This may be done by the trial judge or a judge of the appellate court. The bond and citation are not jurisdictional, but are essential to perfecting a writ of error. That is to say, the bond may be given and the citation issued after the time within which a

[3] Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

[4] Ins. Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

[5] Grant Shoe Co. v. Laird, 203 U. S. 502, 17 Am. B. R. 1; Elliott v. Toeppner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3d Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 649; Bower v. Holzworth (C. C. A. 8th Cir.), 138 Fed. Rep. 28, 15 Am. B. R. 22; *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160.

[6] *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160; Oil Well Supply Co. v. Hall (C. C. A. 4th Cir.), 128 Fed. Rep. 875, 11 Am. B. R. 738.

[7] Rule 11 C. C. A.

writ of error may be sued out. A writ of error is sued out within the meaning of the statute when it is filed in the clerk's office.[8] It is not necessary that the judge actually allow the writ provided it is issued and a copy lodged with the clerk of the court to which it is directed.[9] A citation is necessary in a case removed by writ of error.[10]

A clerk of a district court has no power to issue a writ of error.[11] A clerk of a circuit court may issue a writ of error from a circuit court of appeals to the district court within the same district.[12] The clerk of the supreme court of the United States or a clerk of a circuit court of appeals may issue a writ of error out of each court respectively.

If the defendant in error feels aggrieved by any ruling of the trial judge he must sue out an independent writ of error, with assignment of errors, citation and bond, in the same manner and within the time allowed for prosecuting error, for the purpose of correcting such error. This is called a cross writ of error. One record and bill of exceptions will be sufficient ordinarily for both writs.

A writ of error *propria vigore* carries to the appellate court for review only the technical record which consists of the pleadings, the process and the return thereon, the verdict, the judgment and the execution and the return thereon. No bill of exceptions is required to bring questions arising on the technical record into the appellate court. If it is desired to review any rulings occurring during the progress of the trial these are brought into the record by a bill of exceptions, which when properly signed and allowed becomes a part of the record and is taken to the appellate court by the writ of error. A bill of exceptions to be made a part of the record must be seasonably settled and allowed by the trial judge.[13]

[8] Brooks v. Norris, 11 How. 204, 207, 13 L. Ed. 665; Credit Co. v. Arkansas Cent. R. Co., 128 U. S. 260, 32 L. Ed. 448.

[9] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 337; Alaska United Gold Min. Co. v. Keating, 116 Fed. Rep. 561.

[10] U. S. v. Phillips, 121 U. S. 254, 30 L. Ed. 914.

[11] Long v. Farmers Bank (C. C. A. 8th Cir.), 147 Fed. Rep. 360.

[12] R. S. Sec. 1004. Long v. Farmers Bank (C. C. A. 8th Cir.), 147 Fed. Rep. 360.

[13] Michigan Bank v. Eldred, 143

§ 315. Time within which an appeal may be taken.

An appeal or writ of error under Section 24*a* to review a judgment at law or a decree in equity in a controversy arising in bankruptcy proceedings must be sued out within six months from the entry of such decree or judgment,[1] except from an interlocutory order or decree granting or continuing an injunction or appointing a receiver, when it must be sued out within thirty days from the entry of such order or decree.[2] An appeal under Section 25*a* to review a judgment in bankruptcy proceedings must be taken within ten days after the judgment appealed from has been rendered.[3]

It will be observed that the time begins to run in the case of an appeal or writ of error sued out under Section 24*a* from the entry of such judgment or decree or order.[4] This has been held to mean the date the decree is signed by the judge or actually entered on the records of the court.[5] An appeal to review a judgment in bankruptcy under Section 25*a* must be taken "within ten days after the judgment appealed from has been rendered." The general rule is that where the time begins to run from the rendition of the judgment or de-

U. S. 293, 36 L. Ed. 162; Waldron v. Waldron, 156 U. S. 361, 39 L. Ed. 453; Morse v. Anderson, 150 U. S. 156, 37 L. Ed. 1037; U. S. v. Jones, 149 U. S. 262, 37 L. Ed. 726; Merchants Ins. Co. v. Buckner (C. C. A. 6th Cir.), 98 Fed. Rep. 222, 39 C. C. A. 19.

[1] Act of March 3, 1891, Sec. 11, 26 Stat. at L. 826. *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 14 Am. B. R. 256; Steele v. Buel, 104 Fed. Rep. 968, 5 Am. B. R. 165; Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 6 Am. B. R. 13.

[2] Act of March 3, 1891, Sec. 7, as amended April 14, 1906, 34 Stat. at L.

[3] B. A. 1898, Sec. 25*a*. *In re* McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 16 Am. B. R. 670; Norcress v. Mercantile Co. (C. C. A. 8th Cir.), 101 Fed. Rep. 796, 4 Am. B. R. 317; Peterson v. Nash Bros. (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 7 Am. B. R. 181; *In re* Good (C. C. A. 8th Cir.), 99 Fed. Rep. 389, 3 Am. B. R. 605; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[4] R. S. Sec. 1008; Sec. 7 of the act of March 3, 1891, 26 Stat. at L. 826.

[5] *In re* McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 16 Am. B. R. 670; Silsby v. Foote, 20 How. 290, 15 L. Ed. 822; Boise County v. Gorman, 19 Wall. 662, 22 L. Ed. 226; Polleys v. Black River Co., 113 U. S. 81, 28 L. Ed. 938.

cree it means the date of the decision of the court and not the date of its subsequent entry on the journal or signing by the judge.[6] There are, however, some cases which hold that a decree or judgment is not "rendered" until it is entered on the journal of the court.[7] It has not been decided whether the time limit in appeals in bankruptcy begins to run from the date of the decision or from the date of the entry of the judgment.[8]

It is not competent to contradict or explain the recital of the record with reference to the date of rendition or entry of a judgment by evidence *de hors* the record.[9] If the date appearing in the record is erroneous the correction should be made upon application to the court below.[10]

In computing this time the number of days are computed by excluding the first and including the last, unless the last fall on a Sunday or a holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.[11] The word "holiday" includes Christmas, the fourth of July, the twenty-second of February and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.[12] In computing this time Sundays and holidays are counted, except when the last day would fall on Sunday or a holiday.[13]

An appeal in bankruptcy lies only from a final judgment.[14]

[6] *In re* McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 16 Am. B. R. 670; 2 Ency. of Pl. & Pr. 294 *et seq.*, where the cases are collected.

[7] Humphrey v. Havens, 9 Minn. 301; Exley v. Berryhill, 36 Minn. 117.

[8] *In re* McCall, 145 Fed. Rep. 898, 16 Am. B. R. 670, the circuit court of appeals for the sixth circuit states the distinction without deciding it.

[9] *In re* McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 16 Am. B. R. 670.

[10] The Alaska, 35 Fed. Rep. 555, 557; *In re* McCall (C. C. A. 6th Cir.), 145 Fed. Rep. 898, 16 Am. B. R. 670.

[11] B. A. 1898, Sec. 31.

[12] B. A. 1898, Sec. 1, clause 14.

[13] York's Case, No. 18139 Fed. Cas., 1 Abb. (U. S.) 503.

[14] Goodman v. Brenner (C. C. A. 5th Cir.), 109 Fed. Rep. 481, 6 Am. B. R. 470.

Only final decrees and judgments in controversies arising in bankruptcy can be reviewed on writ of error or appeal [15] except interlocutory orders granting an injunction or appointing a receiver, which is an exception provided by statute. The time within which an appeal may be taken does not run pending a petition for rehearing because a final judgment is not entered until the petition for rehearing is disposed of.[16] But where a petition for rehearing is not filed until the time for appeal has expired the right of appeal is lost and can not be revived by filing a petition for rehearing.[17] When a judgment is amended the time begins to run from the amendment.[18] When a rehearing is granted and a judgment entered thereon the time begins to run from date of the last judgment.[19] A rehearing may be granted in a proper case for the purpose of giving a dissatisfied litigant the right to appeal, but the courts are reluctant to exercise this power.[20]

The limit of time is statutory and can not be extended by either a court of bankruptcy or an appellate court.[21] It is not necessary, however, to give the appeal bond,[22] or file the transcript of record in the appellate court,[23] or issue a citation [24]

[15] Bardes v. Hawarden Bank, 175 U. S. 526, 44 L. Ed. 261, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163.

[16] Kingman v. Western Mfg. Co., 170 U. S. 675, 42 L. Ed. 1192.

[17] Conboy v. First Nat. Bank, 203 U. S. 141.

[18] U. S. v. Gomez, 1 Wall. 690, 17 L. Ed. 677.

[19] *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 4 Am. B. R. 496.

[20] *In re* Wright, 96 Fed. Rep. 820, 3 Am. B. R. 184; *In re* Girard Glazed Kid Co., 129 Fed. Rep. 841, 12 Am. B. R. 295; *In re* Hudson Clothing Co., 140 Fed. Rep. 49, 15 Am. B. R. 254.

[21] Credit Co. v. Ark. Cent. R. Co., 128 U. S. 258, 32 L. Ed. 448; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[22] Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144; Columbia Iron Works v. Nat. Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. 340.

As to what is necessary to be done within the ten days, see Sec. 315, *ante*. As to the bond, see Sec. 320, *post*.

[23] Green v. Elbert, 137 U. S. 615, 34 L. Ed. 792, and cases cited in opinion. See also Sec. 325, *post*.

[24] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.),

within ten days. These are necessary to the due prosecution of an appeal, but are not jurisdictional.

§ 316. How to take an appeal.

Whenever a party feels himself aggrieved by a judgment of a court of bankruptcy in one of the cases specified in Section 25 he may prosecute an appeal to the circuit court of appeals "as in equity." Appeals in equity are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error.[1]

An appeal is regularly taken by presenting to the judge of the court of bankruptcy or one of the judges of the circuit court of appeals [2] a petition for appeal, assignments of error, citation and an appeal bond. The assignment of error and the petition should be filed in the clerk's office before the appeal is allowed.[3] If the papers are regular the judge to whom they are presented allows the appeal and approves the bond. The signing of a citation,[4] or the approving of a bond [5] within time, is a sufficient allowance of an appeal. An appeal will not be allowed unless an assignment of errors is presented with the petition.[6] The giving of a bond is not essential to the taking, although it is to the due prosecution of the appeal.[7] A man-

127 Fed. Rep. 99, 11 Am. B. R. 340; Green v. Elbert, 137 U. S. 615, 34 L. Ed. 792; Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872; Hewitt v. Filbert, 116 U. S. 142, 29 L. Ed. 581; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Altenberg v. Grant, 54 U. S. App. 312, s. c. 83 Fed. Rep. 980.

[1] Gen. Ord. 36; R. S. Sec. 1012. As to procedure on writ of error, see Sec. 314*b*, *ante*; R. S. Secs. 997 *et seq.*; rules of the supreme court; and the rules of the circuit courts of appeals, which are compiled in 90 Fed. Rep. p. li.

[2] Gen. Ord. 36; Norcross v. Mercantile Co. (C. C. A. 8th Cir.), 101 Fed. Rep. 796, 4 Am. B. R. 317.

[3] Rule 11 C. C. A; *In re* Dunning (C. C. A. 9th Cir.), 94 Fed. Rep. 709; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599, 35 C. C. A. 474; Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 12 Am. B. R. 497.

[4] Brown v. McConnell, 124 U. S. 489, 31 L. Ed. 495.

[5] Washington, etc. R. R. Co. v. Bradleys, 7 Wall. 575, 19 L. Ed. 274; Brandies v. Cochrane, 105 U. S. 262, 26 L .Ed. 989; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641.

[6] Rule 11, C. C. A., 90 Fed. Rep. clxvi.

[7] Columbia Iron Works v. Na-

damus will lie to compel a judge to allow an appeal.[8] A simpler proceeding, however, is to apply to one of the judges of the appellate court, if the trial judge refuse to allow the appeal.

An appeal may be allowed in open court.[9] In such case no citation is necessary.[10] Such an allowance of an appeal to be regular should be entered upon the minutes.[10]

Whichever mode is adopted, the allowance of the appeal constitutes the taking of an appeal contemplated by the statute.[11] The appeal must, in some way, be presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers within the clerk's office within the time limited by statute.[12] This must be done within ten days after the judgment appealed from has been rendered.[13]

tional Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. 340. The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; Dodge v. Knowles, 114 U. S. 438, 29 L. Ed. 144.

[8] U. S. v. Adams, 6 Wall. 101, 18 L. Ed. 792; U. S. v. Gomez, 3 Wall. 752, 18 L. Ed. 212; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641.

[9] Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Reiley v. Lamar, 2 Cranch, 344, 2 L. Ed. 300.

Vansant v. Gas Light Co., 99 U. S. 213, 25 L. Ed. 265.

[11] Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. 340; The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; Dodge v. Knowles, 114 U. S. 438, 29 L. Ed. 144; Noonan v. Chester Park Athletic Co., 93 Fed. Rep. 576, 35 C. C. A. 457; Wickelman v. Dick Co., 85 Fed. Rep. 851, 29 C. C. A. 436.

[12] Credit Co. v. Ark. Cent. R. Co. 128 U. S. 258, 32 L. Ed. 448; Farrar v. Churchill, 135 U. S. 609, 34 L. Ed. 246.

In Ballance v. Forsyth, 21 How. 389, 16 L. Ed. 143, no appeal was taken in court below, and the appellant was permitted to withdraw the transcript for purpose of taking an appeal.

In Credit Co. v. Ark. Cent. R. Co., *supra*, the appeal was allowed by a justice of the supreme court in Washington, D. C., on the last day within which an appeal could be taken, but was not presented to the circuit court until five days thereafter. The appeal was not taken in time.

[13] B. A. 1898, Sec. 25*a*; Sec. 315, *ante*.

Whether a court of bankruptcy has power to set aside the allowance of an appeal and grant a second appeal depends upon whether the general power of the court over the order is at an end by reason of the appeal being perfected and the cause transferred to the appellate court, or because it was not done within the term in which the first order was made.[14]

A judge of a court of bankruptcy is not required to make findings of fact for the purpose of an appeal from his decision.[15]

§ 317. Parties to an appeal or writ of error.

An appeal can only be prosecuted by a party to the proceedings upon which the judgment was entered, and who has been aggrieved thereby. The right of appeal depends upon whether the appellant is, in a legal sense, aggrieved; and that must be determined by considering not upon what grounds the judge has proceeded, but what effect his action has upon the claims of the appellant.[1] The party appealing must have an interest in the proceedings. Where he has parted with all his interest in the subject of litigation *pendente lite* he can not appeal from a judgment which injuriously affects such interest.[2]

Where a claim is disallowed the creditor may prosecute an appeal. Where a claim is allowed the trustee, representing all of the creditors, is the proper person to prosecute the appeal.[3] It has been held that a creditor may appeal from the

[14] Aspen Min. & Smelt. Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986; First Nat. Bank v. State Nat. Bank (C. C. A. 9th Cir.), 131 Fed. Rep. 430, 12 Am. B. R. 440.

[15] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

[1] See Farmers' Loan & Trust Co. v. Waterman, 106 U. S. 265, 27 L. Ed. 115.

[2] See Meyer v. Pritchard, 23 Law. Coop., S. C. R. 961; Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Chamberlain v. Cleveland, 1 Black, 419, 17 L. Ed. 93.

[3] Foreman v. Burleigh (C. C. A. 1st Cir.), 109 Fed. Rep. 313, 6 Am. B. R. 230; Livingstone v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 10 Am. B. R. 39; Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313; Gray v. Grand Forks Mercantile Co. (C. C. A. 8th Cir.), 138 Fed. Rep. 344, 14 Am. B. R. 780.

allowance of a claim of another creditor in case the trustee refuses to appeal.[4] A better practice is for the dissatisfied creditor to procure an order of the court of bankruptcy to either direct an appeal by the trustee or permit the creditor to appeal in the name of the trustee.[5]

On an appeal by a creditor from an order approving a composition all the assenting creditors who have received money due them under the composition must be made parties to the appeal.[6]

A creditor or the bankrupt are the proper parties to take an apppeal from a judgment granting or refusing a discharge. A trustee will not ordinarily be permitted to prosecute an appeal from such judgments, for the reason that the contest is between creditors and the bankrupt and does not affect the administration of the bankrupt's estate in any respect.

Where an appeal is prosecuted from a judgment adjudging or refusing to adjudge the defendant a bankrupt it should be prosecuted by the bankrupt or by the petitioning creditors or a creditor intervening for the purpose of contesting the adjudication,[7] but not by one who intervenes after the judgment for the purpose of rehearing the order of adjudication.[8]

It is well settled that all the parties against whom a joint judgment is rendered must, except where they have distinct and separate interests and the decree is several and does not jointly affect them all, unite in the appeal.[9] Thus it would

[4] *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 4 Am. B. R. 369; McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685; Ohio Valley Bank Co. v. Mack (C. C. A. 6th Cir.), 149 Fed. Rep. ——.

[5] Chatfield v. O'Dwyer (C. C. A. 8th Cir.), 101 Fed. Rep. 797, 4 Am. B. R. 313. See also McDaniel v. Stroud (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 5 Am. B. R. 685; Ohio Valley Bank v. Mack (C. C A. 6th Cir.), 149 Fed. Rep. ——.

[6] Marshall, Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693.

[7] *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 3 Am. B. R. 559.

[8] *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 7 Am. B. R. 441.

[9] Hardee v. Wilson, 146 U. S. 179, 36 L. Ed. 933.

Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302.

seem that where an appeal is taken from a judgment adjudging a partnership bankrupts, that all the partners should unite in the appeal. Where an appeal is taken from a judgment rejecting a joint debt or claim, the owners of such claim should unite in the appeal. Where an appeal is taken from a judgment refusing to adjudge a defendant a bankrupt, that all the petitioning creditors at least, and probably also such creditors as may have appeared to join in the petition under Section 59*f*, should unite in the appeal.

Where one of several persons having a joint interest desires to appeal and the others interested with him do not, he may appeal alone without joining the others as appellants by showing a valid excuse for not joining them. This can be done only by a summons and severance or some equivalent proceeding, such as a request to the others and their refusal to join in the apppeal, or at least a notice to them to appear and their failure to do so.[10] This must be evident upon the

[10] O'Dowd v. Russell, 14 Wall. 404, 20 L. Ed. 857; Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953.

In Masterson v. Herndon, *supra*, the supreme court sand: "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of the appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and to stop that party from bringing an appeal for the same matter. The latter point is one to which the court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this."

record of the court appealed from in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter.[11] Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he can not ask its reversal on any matter which will injuriously affect their interests.[12]

It is equally well settled that where the judgment is severable in fact and in law one party thereto may be allowed to prosecute an appeal therefrom without joining a codefendant who does not desire to appeal.[13] Thus it would seem that an appeal from a judgment rejecting several distinct debts or claims that any one debtor or claimant would be entitled to prosecute an appeal without joining the others.[14] Where such an appeal is taken it carries with it so much of the case and such of the parties as are necessary for the determination of his rights.[15]

All the parties whose rights would be affected should be made appellees. Thus, in an appeal by a bankrupt from an

[11] Inglehart v. Stansbury, 151 U. S. 68, 38 L. Ed. 76, and cases collated in the opinion.

[12] Terry v. Abraham, 93 U. S. 38, 23 L. Ed. 794.

[13] Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; City National Bank v. Hunter, 129 U. S. 557, 578, 32 L. Ed. 752; Brewster v. Wakefield, 22 How. 118, 128, 16 L. Ed. 301.

[14] In Crim v. Woodford (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 14 Am. B. R. 302, the court said: "There is a motion to dismiss the appeal because the interest of the petitioners Crim, Moore, and Manown are not joint, but are several and distinct, and therefore it is claimed they can not collectively join in the appeal. It is true that each of the appellants named has a separate interest, but, as the court below entered but one judgment and allowed the joint appeal, there appears to be no good reason why they should not all be heard together, as the main question determined by the court below and for consideration here is common to all the appellants, and separate appeals would have served no good purpose, and involved additional and unnecessary expense. The motion to dismiss the appeal on that ground therefore is refused."

[15] Milner v. Meek, 95 U. S. 252, 24 L. Ed. 444.

adjudication in bankruptcy upon an involuntary petition, he should make appellees the petitioning creditors and probably such other creditors as have entered their appearance to join in the petition under Section 59*f*. In an appeal from a judgment denying a discharge the bankrupt should make the creditors opposing the discharge appellees. In an appeal by creditors from a judgment rejecting a debt or claim the trustee should be made appellee. He represents all the creditors and therefore the creditors are not necessary parties. In an appeal from a judgment refusing to adjudicate the defendant a bankrupt, or granting a discharge, the bankrupt only should be made appellee. In an appeal from a judgment allowing a debt or claim of five hundred dollars or over the creditor or creditors only, owning such claims, need be made appellees.

On an appeal by a bankrupt from an order refusing to confirm a composition the creditors must be made appellees and the trustee does not represent them for this purpose.[16] When an appeal is taken by a creditor from an order approving a composition all the creditors assenting to such composition and having received money due them under the composition must be made parties to the appeal.[17]

In a controversy between a trustee and certain lien creditors the stake holders of the fund in controversy are not necessary parties to the appeal.[18]

§ 318. Petition for appeal.

The petition for appeal is regularly entitled in the court of bankruptcy, together with the style of the case. It may be substantially in the following words: "The above-named A. B., conceiving himself aggrieved by the judgment made and entered on the —— day of ——, in the above-entitled cause, does hereby appeal from such judgment to the United States

[16] Ross v. Saunders (C. C. A. 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

[17] Marshall, Field & Co. v. Wolf & Bro. Dry Goods Co. (C. C. A. 8th Cir.), 120 Fed. Rep. 815, 9 Am. B. R. 693.

[18] Love, Trustee, v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 16 Am. B. R. 171.

circuit court of appeals for the —— circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which such judgment was made, duly authenticated, may be sent to the United States circuit court of appeals for the —— circuit."[1] This petition should be signed by the petitioner or his counsel and dated. The judge ordinarily endorses upon the petition that the foregoing claim of appeal is allowed and signs it, together with the date of the allowance. The approving of an appeal bond or signing a citation is a sufficient allowance.[2]

§ 319. Assignments of error.

The appellant must file with the clerk of the court below, with his petition for the appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged.[1]

No appeal or writ of error will be allowed until such assignment of errors has been filed. Such assignment of errors forms part of the transcript of the record and must be printed with it. When this is not done, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option, may notice a plain error not assigned.[2] A general

[1] See Form No. 166, *post*.

[2] R. R. Co. v. Bradleys, 7 Wall. 577, 19 L. Ed. 274; Sage v. R. R. Co., 96 U. S. 712, 24 L. Ed. 641; Brown v. McConnell, 124 U. S. 489, 31 L. Ed. 495.

[1] Rule 11, C. C. A., and cases collated in 90 Fed. Rep., p. cxlvi, *et seq.*; *In re* Dunning (C. C. A. 9th Cir.), 94 Fed. Rep. 709; Lloyd v. Chapman (C. C. A. 9th Cir.), 93 Fed. Rep. 599, 35 C. C. A. 474; Lockman v. Lang (C. C. A. 8th Cir.), 128 Fed. Rep. 279, 12 Am. B. R. 497; Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 16 Am. B. R. 678.

For forms of assignment of errors, see Loveland's Forms of Fed. Prac., Nos. 1403 to 1407.

[2] Dufour v. Lang, 4 C. C. A. 663, 54 Fed. Rep. 913, 917; Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. Rep. 139; McClellan v. Pyeatt, 50 Fed. Rep. 686, 1 C. C. A. 613; Haldame v. U. S., 69 Fed. Rep. 819, 16 C. C. A. 447; Prichard v. Budd, 76 Fed. Rep. 710, 22 C. C. A. 504. Rule 2 C. C. A. and cases collated in 90 Fed. Rep., p. cxlvi, *et seq.*

assignment of error may be amended by filing a more specific assignment.[3] It has been held that where the assignment of errors is included in the petition it is sufficient.[4]

§ 320. Bond on appeal.

An appeal bond is ordinarily essential to the prosecution of an appeal, although it is not to the taking of an appeal.[1] It has been permitted to be given by the appellant in the appellate court.[2] Trustees are not required to give such bonds.[3]

The bond on appeal is regularly conditioned that the plaintiff shall prosecute his appeal to effect and answer all damages and costs if he fail to make such plea good.[4] All the appellants need not join in the bond.[5] The bond is made payable to the appellee.[6] It is not essential to the validity of an appeal bond that all of the appellees be named in it.[7] It should not be made payable to any other person.[8]

The amount of the bond is fixed by the judge allowing the appeal. He is the sole and exclusive judge of what it should be and his decision is final, unless he violates a statute or rule of practice.[9] The judge can not delegate the approval of the

[3] Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 16 Am. B. R. 678.

[4] Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. 517, 30 C. C. A. 235.

[1] R. S. Secs. 1000 and 1012; Dodge v. Knowles, 114 U. S. 430, 29 L. Ed. 144; Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127; The Dos Hermanos, 10 Wheat. 306, 311, 6 L. Ed. 328.

[2] Anson, Bangs & Co. v. Blue Ridge R. R. Co., 23 How. 1, 16 L. Ed. 517; Brobst v. Brobst, 2 Wall. 96, 17 L. Ed. 905; Seymour v. Freer, 5 Wall. 822, 18 L. Ed. 564. See also Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127.

[3] B. A. 1898, Sec. 25*c*.

[4] For form of bond, see Form No. 169, *post*. See also Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841; Chateaugay Ore and Iron Co. v. Blake, 35 Fed. Rep. 804; Peace River Phosphate v. Edwards, 70 Fed. Rep. 728, 17 C. C. A. 358.

[5] Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251.

[6] Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

[7] Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 16 Am. B. R. 678.

[8] Davenport v. Fletcher, 16 How. 142, 14 L. Ed. 879.

[9] Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515.

bond to the clerk [10] or to a commissioner.[11] It is not necessary that the judge approve the bond in court.[12] The appellate court, however, may change the amount of the bond, in a proper case, where the circumstances have changed so that the security which was good and sufficient at the time it was taken does not continue to be so.[13] Where an appeal bond is defective the appellate court will not, for that reason, dismiss the appeal, but will give the appellant an opportunity to furnish new security.[14]

§ 321. Supersedeas.

An appeal does not necessarily operate as a supersedeas to stay proceedings in a court of bankruptcy. A supersedeas is a statutory right. It follows as a matter of law from a compliance by the appellant with the provisions of the act of congress in that behalf.[1] Without such compliance no court can confer it.[2]

The statute which regulates the matter of supersedeas is as follows: "In any case where a writ of error may be a supersedeas the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to

[10] O'Reilly v. Edrington, 96 U. S. 724, 24 L. Ed. 659; First Nat'l Bank v. Omaha, 96 U. S. 737, 24 L. Ed. 881; Freeman v. Clay, 48 Fed. Rep. 849, 1 C. C. A. 115.

[11] Haskins v. R. R. Co., 109 U. S. 106, 27 L. Ed. 873.

[12] Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 514.

[13] Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515; Williams v. Claflin, 103 U. S. 753, 26 L. Ed. 606; Harwood v. Dickerhoff, 117 U. S. 200, 29 L. Ed. 887; Johnson v. Waters, 108 U. S. 4, 27 L. Ed. 630.

[14] Davis v. Wakelee, 156 U. S. 684-5, 39 L. Ed. 578; N. O. Ins. Co. v. Albro Co., 112 U. S. 506, 28 L. Ed. 809; Union Pacific Co. v. Callaghan, 161 U. S. 95, 40 L. Ed. 628.

[1] R. S. Sec. 1007; Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; Gay v. Parpart, 101 U. S. 391, 25 L. Ed. 841.

[2] French v. Shoemaker, 12 Wall. 100, 20 L. Ed. 270; Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810; Sage v. R. R. Co., 93 U. S. 416, 23 L. Ed. 933.

stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of (*the said term of sixty*) (ten) days." [3]

The allowance of an appeal with reference to superseding a judgment is considered the equivalent of a writ of error. It has accordingly been held that an appeal, to operate as a supersedeas, must be perfected and the security given in accordance with the provisions quoted above.[4] Where a petition for rehearing, or a motion to set aside the judgment, is filed, the time does not begin to run until such petition or motion has been denied.[5] Where the appeal is taken within sixty days a judge of the appellate court may allow a supersedeas after that time.[6] But if no appeal is taken within the sixty days' period no judge of the appellate court or the court itself has power to grant a supersedeas.[7]

The application for a supersedeas is regularly made to the court of bankruptcy and not to the appellate court.[7] The amount of the bond is fixed by the judge allowing it. He is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of prac-

[3] R. S. Sec. 1007.

[4] Adams v. Law, 16 How. 148, 14 L. Ed. 880; Hudgins v. Kemp, 18 How. 535, 15 L. Ed. 511, 514; French v. Shoemaker, 112 Wall. 100, 20 L. Ed. 270; Bigler v. Waller, 12 Wall. 149, 20 L. Ed. 260; Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810.

[5] Texas & P. Ry. Co. v. Murphy, 111 U. S. 488, 28 L. Ed. 492; Brockett v. Brockett, 2 How. 238, 11 L. Ed. 251; Memphis v. Brown, 94 U. S. 715, 24 L. Ed. 244. In computing this time, Sundays are excluded. See Danville v. Brown, 128 U. S. 503, 32 L. Ed. 507.

[6] Peugh v. Davis, 110 U. S. 227, 28 L. Ed. 127.

[7] Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810; N. E. R. R. Co. v. Hyde (C. C. A. 1st Cir.), 101 Fed. Rep. 397, 41 C C. A. 404; Logan v. Goodwin (C. C. A. 8th Cir.), 101 Fed. Rep. 654, 41 C. C. A. 537; Covington Stock Yards v. Keith, 121 U. S. 248, 30 L. Ed. 914.

As to when the appellate court will grant a supersedeas, see Hunt v. Oliver, 109 U. S. 177, 27 L. Ed.

tice.[8] The appellate court may, however, in a proper case and under proper circumstances, change the amount of the bond,[9] or vacate a supersedeas when the approval of the bond was obtained by fraud or perjury; and in such cases may refuse to accept a new bond.[10]

The approval of the bond need not be in writing.[11] The signing of a citation and taking the oath of the sureties as to their sufficiency is a sufficient approval of the bond.[12] The bond when approved is a matter of record in the bankruptcy court, and a copy thereof should be included in the transcript of the record.

§ 322. Citation.

The object of a citation on an appeal is to give notice of the removal of the case into the appellate court. The citation is usually presented to and signed by the judge [1] at the time the appeal is allowed. It may, however, be signed by the judge subsequently or issued by the appellate court at any time before the appeal becomes inoperative.[2] The issuing of the citation is not jurisdictional, but the court will not hear a case until the parties are brought into court by citation.[3] The order in cases, where all of the necessary parties

897; Railroad v. Bradleys, 7 Wall. 575, 19 L. Ed. 274.

[8] Jerome *v.* McCarter, 21 Wall. 17, 22 L. Ed. 515.

[9] Jerome v. McCarter, 21 Wall. 17, 22 L. Ed. 515; Williams v. Claflin, 103 U. S. 753, 26 L. Ed. 606; Harwood v. Dickerhoff, 117 U. S. 200, 29 L. Ed. 887; Johnson v. Waters, 108 U. S. 4, 27 L. Ed. 630.

[10] R. R. Co. v. Schutte, 100 U. S. 644, 25 L. Ed. 605.

[11] Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377.

[12] Silver v. Ladd, 6 Wall. 440, 18 L. Ed. 828.

[1] R. S. Secs. 998 and 999. For Form of Citation, see Form No. 170, *post.*

[2] Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 12 Am. B. R. 497; Gray v. Grand Fork Mercantile Co., 138 U. S. 344, 14 Am. B. R. 780; Columbia Iron Works v. National Lead Co. (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 11 Am. B. R. 340; Altenberg v. Grant, 54 U. S. App. 312, 83 Fed. Rep. 980, 28 C. C. A. 244; R. R. Equipment Co. v. Southern Ry. Co. (C. C. A. 6th Cir.), 92 Fed. Rep. 541, 34 C. C. A. 519.

[3] Mendenhall v. Hall, 134 U. S. 559, 33 L. Ed. 1012; Chicago & P. R. Co. v. Blair, 100 U. S. 661, 25 L. Ed. 587; R. R. Equipment Co. v. Southern Ry. Co. (C. C. A. 6th Cir.), 92 Fed. Rep. 541, 34 C. C. A.

have not been served, is that the case stand over for the purpose of giving the appellant an opportunity to apply for a citation.

Ordinarily no citation is necessary on an appeal allowed in open court and perfected during the term at which the decree appealed from was rendered.[4] As there are no terms in bankruptcy a citation is regularly issued in each case because the appeal can not be said to be perfected at the term at which the judgment below is rendered.[5]

The citation must be served upon the appellee or his attorney of record in the court below.[6] It may be served by the marshal. The usual practice, however, is for counsel for the appellee to accept service in writing upon the citation without formal service to the marshal.[7] Where the citation is actually issued upon the allowance of an appeal the omission to serve it before the first day of the term does not avoid the appeal. A new citation may be ordered to be issued and served.[8] It is not sufficient proof of service of a citation to file an affidavit that notice of citation was given to defendant's attorney by depositing in the postoffice a copy of said citation, postpaid, addressed to them at their respective places of abode and giving the names and places.[9]

Where a party dies before an appeal is allowed and prosecuted, the suit should be revived in the court of bankruptcy and the citation should be addressed to the proper party in the record at that time.[10]

All appeals and citations must be made returnable not exceeding thirty days from the day of signing the citation,

519; Evans v. State Bank, 134 U. S. 330, 33 L. Ed. 917; Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872.

[4] Jacobs v. George, 150 U. S. 415, 37 L. Ed. 1127.

[5] Lockman v. Lang (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 12 Am. B. R. 497.

[6] Bacon v. Hart, 1 Black, 39, 17 L. Ed. 52; Chicago & P. R. Co. v. Blair, 100 U. S. 661, 25 L. Ed. 587; Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

[7] Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

[8] Dayton v. Lash, 94 U. S. 112, 24 L. Ed. 33; Altenberg v. Grant, 83 Fed. Rep. 980, 28 C. C. A. 244.

[9] Tripp v. Santa Rosa Street R. Co., 144 U. S. 126, 36 L. Ed. 371.

[10] Bigler v. Waller, 12 Wall. 142, 20 L. Ed. 260.

whether the return day fall in vacation or in term time, and be served before the return day.[11]

A general appearance by the appellee, at the term the record is filed, is a waiver of the issuing and serving of a citation.[12] The appearance of counsel at a subsequent term and making a motion to dismiss does not waive a citation.[13] A general appearance can not be withdrawn or changed to a special appearance without leave of court.[14]

A writ of mandamus is not ordinarily granted to compel a judge to sign a citation.[15] If the judge refuses to sign a citation, resort should be had to a judge of the appellate court.

§ 323. The record.

When an appeal has been allowed, a transcript of the record of the proceedings in the court of bankruptcy must be prepared and filed in the appellate court. The record required to be certified is the record of the case in the court of bankruptcy.[1]

The referee has no power to certify a record of proceedings before him to a circuit court of appeals.[2] It is the duty of the clerk to make the transcript after and not before he is directed by counsel to do so. His fees are prescribed by statute [3] and should be paid before the transcript is delivered for filing. If a clerk refuses to produce the transcript he may be compelled to do so by mandamus or order of court.[4]

[11] Rule 14, C. C. A., 90 Fed. Rep. clviii; Peace River Phosphate Co. v. Edwards, 70 Fed. Rep. 728, 17 C. C. A. 358; Altenberg v. Grant, 83 Fed. Rep. 980, 28 C. C. A. 244; Central Trust Co. v. Continental Trust Co., 86 Fed. Rep. 517, 30 C. C. A. 235; Freeman v. Clay, 48 Fed. Rep. 849, 1 C. C. A. 115.

[12] Richardson v. Green, 130 U. S. 104, 32 L. Ed. 872; Buckingham v. McLean, Assignee in bankruptcy, 13 How. 150, 14 L. Ed. 90; U. S. v. Armejo, 131 U. S. Appendix, lxxxii.

[13] Radford v. Folsom, 123 U. S. 725, 31 L. Ed. 292.

[14] U. S. v. Armejo, 131 U. S. Appendix, lxxxii; U. S. v. Curry, 6 How. 106, 12 L. Ed. 363.

[15] *Ex parte* Virginia Commissioners, 112 U. S. 177, 28 L. Ed. 691.

[1] Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475.

[2] Cook Inlet Coal Fields Co. v. Caldwell (C. C. A. 4th Cir.), 147 Fed. Rep. 475.

[3] R. S. Sec. 828. See Thornton v. Ins. Co., 125 Fed. Rep. 250.

[4] U. S. v. Gomez, 3 Wall. 766, 18 L. Ed. 212; U. S. v. Booth, 18 How. 477, 15 L. Ed. 464.

No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings, which are necessary to the hearing in the appellate court, shall be filed.[5] The appeal makes the entire record available to counsel for the appellant and imposes upon him and the clerk of the lower court the duty of inserting in the transcript of the record sent to the appellate court everything material to the question to be presented there.[6] Such orders and proceedings as are had before the referee in any case, after the same is concluded by him and the proceedings certified, become a part of the record of the case and as such belong in the office of the clerk of the court and may be included by him as a part of the record. Where a case has been before an appellate court on a former appeal the record on the second appeal should be complete in itself, for the reason that an appellate court is not bound to take judicial notice of its own records.[7]

The record should contain only such matter as is necessary to the hearing, and not irrelevant matter or useless repetitions.[8] It is the duty of the parties or their counsel to attend to this.[8]

[5] Rule 14, C. C. A., 90 Fed. Rep. clvii; Williams Bros. v. Savage (C. C. A. 4th Cir.), 120 Fed. Rep. 497, 9 Am. B. R. 720; Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Devries v. Shanahan (C. C. A. 4th Cir.), 122 Fed. Rep. 629, 10 Am. B. R. 518.

[6] Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 13 Am. B. R. 176.

See also Teller v. U. S. (C. C. A. 8th Cir.), 111 Fed. Rep. 119, 49 C. C. A. 263.

[7] *In re* Osborne (C. C. A. 1st Cir.), 115 Fed. Rep. 1, 8 Am. B. R. 165, the court said: "While it is well settled that we can take judicial knowledge of our own records, it is not at all clear that we are always required to do so. Cushman Paper Box Machine Co. v. Goddard, 37 C. C. A. 221, 95 Fed. Rep. 664, 666. The proper and safe way of proceeding even with reference to the tribunal in which the prior record remains, is by plea and proof. Nevertheless, as the practice with reference to a petition of the character now before us is not yet fully understood, even if it may be said to be thoroughly settled, we will avail ourselves of the right which we have to take judicial knowledge of our own proceedings."

[8] See observation of the supreme court in Union Pac. Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431; Burnham v. Street Ry. Co., 87 Fed. Rep. 168, 30 C. C. A. 594;

In taking appeals in bankruptcy it will frequently occur that many papers and proceedings ought not to be included in the record. That the clerk may not be left in doubt, he may require of the attorney for the appellant a præcipe stating specifically what the record shall contain, and attach a copy of the præcipe to the transcript.[9] The certificate in such case should be that it is a true and correct transcript, according to the præcipe. If the attorney for the appellee asks him to include other parts of the record in the transcript, he may apply to the court of bankruptcy for directions in respect to such matter.[10]

Where the record is filed in an appellate court and is made to appear by the appellee that necessary papers, etc., have been omitted in making the transcript, they may be supplied upon application to that court.[11] Where witnesses are examined orally, the testimony presented in that form or its substance must be stated in writing and made a part of the record, or it will be entirely disregarded on appeal.[12] Exhibits attached to depositions are properly included in a record.[13] The fact that evidence is not included in the transcript is not a sufficient reason to dismiss the appeal.[14] The remedy is

Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. Rep 237. 9 C. C. A. 468; Union Pac. R. Co. v. U. S., 116 U. S. 402, 29 L. Ed. 677

If the record contains such parts as is called for by either party it is sufficient; Blanks v. Klein, 49 Fed. Rep. 1, 1 C. C. A. 254.

[9] Cunningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Burnham v. Street Ry. Co., 87 Fed. Rep. 168, 30 C. C. A. 594. See also Penn. Co. v. Jacksonville, etc. Ry. Co., 55 Fed. Rep. 131, 5 C. C. A. 53; Florida Cent. R. R. Co. v. Schutte, 100 U. S. 644, 647, 25 L. Ed. 605.

[10] Hoe v. Kahler, 27 Fed. Rep. 145.

But see *In re* Robertshaw Mfg. Co., 135 Fed. Rep. 220, 14 Am. B. R. 341.

[11] Florida Cent. R. R. Co. v. Schutte, 100 U. S. 644, 647, 25 L. Ed. 605.

See also Certiorari to complete record, Sec. 306, *ante*.

[12] Williams Bros. v. Savage (C. C. A. 4th Cir.), 120 Fed. Rep. 497, 9 Am. B. R. 720; Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521. See Rule of May 15, 1893, 149 U. S. 793.

[13] Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 35 L. Ed. 521.

[14] Taft & Co. v. Century Sav. Bank (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 15 Am. B. R. 504; Cun-

a writ of *certiorari* to bring up the omitted parts of the record of the court below if necessary to the hearing in the appellate court. The opinion of the court of bankruptcy, if in writing, should be annexed to the transcript.[15]

The transcript must be authenticated under the seal of the court and be signed by the clerk.[16] Where the certificate is under the seal of the court it may be amended by adding the signature of the clerk.[17]

In the case of a writ of error a bill of exceptions is necessary to bring up the evidence and rulings of the court during the trial. A bill of exceptions has no function and serves no purpose on an appeal from a decree in equity or bankruptcy.[18] A judge of a court of bankruptcy is not required to make findings of fact for the record on an appeal from his decision.[19]

§ 324. Amendments to the record.

Where, from inadvertence or mistake of the clerk of the court below, or from any other cause, the record transmitted to the appellate court is defective or incorrect, the errors or mistakes are regularly corrected by a writ of *certiorari* to bring up a full and true transcript of the record.[1] The clerk

ningham v. German Ins. Bank (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 4 Am. B. R. 192; Flickinger v. First Nat. Bank (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 16 Am. B. R. 678.

[15] Rule 14 C. C. A.; Teller v. U. S. (C. C. A. 8th Cir.), 111 Fed. Rep. 119, 49 C. C. A. 263.

[16] Blitz v. Brown, 7 Wall. 693, 19 L. Ed. 280.

A certificate signed "A. B., clerk of said court, by C. D., deputy," is a sufficient signature; Garneau v. Dozier, 100 U. S. 7, 25 L. Ed. 536.

[17] Idaho & Ore. Land Imp. Co. v. Bradbury, 132 U. S. 509, 33 L. Ed. 433.

[18] Dodge v. Norlin (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 13 Am. B. R. 176.

[19] *In re* Meyers, 105 Fed. Rep. 353, 5 Am. B. R. 4.

[1] See Sec. 306, *ante*.

In Devries v. Shanahan (C. C. A. 4th Cir.), 122 Fed. Rep. 629, 10 Am. B. R. 518, the court said: "The record in this case, whilst it suggests facts material to its consideration, does not set them forth as clearly as is necessary to its decision. It is, therefore, ordered that the cause be remanded to the district court, with instructions to require all the facts connected with the failure to prove and prosecute the claim of the estate of John M.

of the court of bankruptcy may supply an omission in a record by certifying such omitted parts without an order of court.[2] He can not in this matter correct an erroneous statement in a transcript.[3]

Appeals are heard upon the pleadings and proofs below. No new evidence can be admitted, and the record will not ordinarily be amended in the appellate court.[4] It is true, an amendment may be had in the appellate court by consent of parties,[5] and so also amendments have been allowed in the appellate court to substitute the name of an officer as appellant in place of his predecessor in office;[6] and where it appeared by the certificate of the clerk that he had committed a clerical

Orem, deceased, against the bankrupt estate of W. Morris Orem, prior to the petition of the appellee, to be inquired into and reported to it, and, when such facts are so reported, to pass upon the same."

In Barber v. Coit (C. C. A. 6th Cir.), 118 Fed. Rep. 272, 55 C. C. A. 145, the following order was made: "The decree of the district court of the United States is reversed and the cause remanded to said court, with directions that the cause be remitted to the referee by said court with directions that he take proof of the pleadings in said Ohio case, and that upon the record as thus completed the referee proceed to rehear the matter. This order is made because the case is not properly prepared for decision and because great injustice may be done if the cause is to be decided on present record. The order is made upon our own motion on authority of Estho v. Lear, 7 Pet. 130-1, 8 L. Ed. 632, and Illinois Cent. Rd. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018. The costs of this appeal will be divided."

[2] Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 744, 745.

[3] Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 514.

[4] Pacific R. Co. v. Ketchum, 95 U. S. 1, 24 L. Ed. 347; Udall v. Steamship "Ohio," 17 How. 17, 15 L. Ed. 42; Hudgins v. Kemp, 18 How. 530, 15 L. Ed. 511, 514; The Protector, 11 Wall. 82, 20 L. Ed. 47.

In Kennedy v. Bank of Georgia, 8 How. 610, 12 L. Ed. 1209, the supreme court said: "There is nothing in the nature of appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments, etc., but the practice has been to remand the cause to the lower court for amendment." See also Denny v. Pironi, 141 U. S. 121, 35 L. Ed. 657; Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543; Tug River Coal & Salt Co. v. Brigel, 67 Fed. Rep. 625, 14 C. C. A. 577, remanded and amendment allowed in circuit court in 73 Fed. Rep. 13.

[5] As was done in Fletcher v. Peck, 6 Cranch, 87, 3 L. Ed. 162.

[6] Bowden v. Johnson, 107 U. S. 251, 27 L. Ed. 386; Gates v. Goodloe, 101 U. S. 612, 25 L. Ed. 895; U. S. v. Hopewell, 51 Fed. Rep. 708, 2 C. C. A. 510.

error in the transcript it was corrected in the appellate court without issuing a writ of *certiorari*.[7]

§ 325. Perfecting an appeal and filing the record.

An appeal is taken within the contemplation of the statute when it is allowed and the papers filed in the clerk's office.[1] The taking of an appeal deprives the court of bankruptcy of jurisdiction to further consider matters involved in the appeal. It can only assist in perfecting the appeal. An appeal does not affect its jurisdiction over other matters in the proceedings from which no appeal is taken. Perfecting an appeal by giving a bond,[2] issuing and serving a citation,[3] and filing the record in the appellate court is essential to the prosecution of a suit in an appellate court.

It is the duty of the appellant to file the record with the clerk of the appellate court by or before the return day, whether in vacation or in term time.[4] The appeal and citation must be made returnable not exceeding thirty days from the date of the signing of the citation.[5] The time for filing the record may be enlarged before its expiration by the justice or judge who signed the citation, and the order of enlargement should be filed with the clerk of the appellate court.[6] This rule is directory, and it is within the sound discretion of the appellate court to relieve parties who have not complied with it.[7] Unless the record is filled within the next term succeed-

[7] Woodward v. Brown, 13 Pet. 1, 10 L. Ed. 31.

[1] Sec. 316, *ante*.

[2] Sec. 320, *ante*.

[3] Sec. 322, *ante*.

[4] Rule 16, C. C. A. 90 Fed. Rep. clix; *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370. See also Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496, 56 C. C. A. 646.

[5] Rule 14, C. C. A. 90 Fed. Rep. clviii.

[6] Rule 16, C. C. A. 90 Fed. Rep. clix.

An order extending the time for filing the record on appeal, made after the time had expired, is ineffective. *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

No other judge is entitled to extend the time for filing record; West v. Irwin, 54 Fed. Rep. 419, 4 C. C. A. 401.

[7] Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, 17 C. C. A. 472.

ing the allowance of the appeal, the appeal has spent its force and should be dismissed.[8] One term is held annually by the circuit court of appeals in the several judicial circuits.[9] Where the appellant without fault on his part is prevented from filing the transcript within such time by the fraud of his opponent or the contumacy of the clerk or the order of the court below, his time to file the transcript may be enlarged by the appellate court.[10] Where the record is filed at the next term, but after the return day, or the time as enlarged for filing it, and before a motion to dismiss is filed, the objection that the record was not filed in time is not sufficient to dismiss the appeal.[11]

If the appellant fails to file his record on or before the return day, the appellee may have the case docketed and dismissed upon producing the certificate, whether in term time or in vacation, from the clerk of the court of bankruptcy, stating the case and certifying that such appeal has been duly allowed.[12] In no case is the applicant entitled to docket the case and file the record after the same has been docketed and dismissed, unless by order of the court.[13] The appellee may, at his option, docket the case and file a copy of the record with the clerk of the appellate court; and if the case is docketed and a copy

[8] Wauton v. DeWolf, 142 U. S. 138, 35 L. Ed. 965; Evans v. State Bank, 134 U. S. 330, 3 L. Ed. 917; Grigsby v. Purcell, 99 U. S. 505, 25 L. Ed. 354.

[9] Act of March 3, 1891, 26 Stat. at L. 826, Sec. 3. In some circuits more than one term is held. Pender v. Brown (C. C. A. 4th Cir.), 120 Fed. Rep. 496, 56 C. C. A. 646.

[10] See U. S. v. Gomez, 3 Wall. 752, 18 L. Ed. 212; Ableman v. Booth, 21 How. 506, 512, 16 L. Ed. 169.

[11] Bingham v. Morris, 7 Cranch, 99, 3 L. Ed. 281; Farmers Loan & Trust Co. v. Chicago N. P. R. Co., 73 Fed. Rep. 314, 19 C. C. A. 477; Altenberg v. Grant, 83 Fed. Rep. 980, 28 C. C. A. 244; Jones v. Mann, 72 Fed. Rep. 85, 18 C. C. A. 442; Andrews v. Thum, 64 Fed. Rep. 149, 12 C. C. A. 77; West Chicago St. R. R. Co. v. Ellsworth, 77 Fed. Rep. 664, 23 C. C. A. 393; Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp., 61 Fed. Rep. 237, 9 C. C. A. 468.

[12] Rule 16, C. C. A. 90 Fed. Rep. clx. See Loveland's Forms of Fed. Prac., Form No. 1490.

This was done *In re* Alden Electric Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 415, 10 Am. B. R. 370.

[13] Rule 16, C. C. A. 90 Fed. Rep. clx; Florida v. Charlotte Harbor Phosphate Co., 70 Fed. Rep. 883, 17 C. C. A. 472.

of the record filed with the clerk of the appellate court by the appellant within the period limited and prescribed by the rules or by the appellee at any time thereafter, the case shall stand for argument at the term.[14]

Upon filing the transcript of record the appearance of counsel for the party docketing the case must be entered.[15]

Filing the record and docketing the case in the appellate court confers jurisdiction upon that court of that case. The trial court has no power to enter orders affecting the matter involved on the appeal thereafter.[16]

§ 326. Proceedings in a circuit court of appeals.

The practice in a circuit court of appeals is generally substantially the same as that of the supreme court of the United States. In certain respects it has been changed by rules. When a transcript of record is filed in the office of the clerk, it is his duty to docket the case. He enters upon a docket all the cases brought to and pending in the court in their proper chronological order. The transcript of the record is then printed in the manner prescribed by the rules of the circuit court of appeals in which the case is pending.[1] The printing rules vary in the several courts. Printed briefs are required. The number of briefs, what they shall contain, and the time within which they must be filed is prescribed by the rules of the several circuit courts of appeals.[2]

[14] Rule 16, C. C. A. 90 Fed. Rep. clx.

[15] Rule 16, C. C. A. 90 Fed. Rep. clx.

[16] First Nat. Bank v. State Nat. Bank (C. C. A. 9th Cir.), 131 Fed. Rep. 430, 12 Am. B. R. 440. See also Aspen Min. Co. v. Billings, 150 U. S. 31, 37 L. Ed. 986.

[1] See Rule 23, C. C. A.

[2] Rule 24, C. C. A.; Van Gunden v. Iron Co., 52 Fed. Rep. 838, 3 C. C. A. 294; City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. Rep. 756, 8 C. C. A. 253; Vider v. O'Brien, 62 Fed. Rep. 326, 10 C. C. A. 385; Texas & P. Ry. Co. v. Reeder, 76 Fed. Rep. 550, 22 C. C. A. 314; Doe v. Mining Co., 70 Fed. Rep. 455, 17 C. C. A. 190.

In City of Milwaukee v. Schailer & Schniglau Co., 91 Fed. Rep. 858, 34 C. C. A. 112, the circuit court of appeals for the seventh circuit said: "Error is assigned upon the several rulings stated, but the brief for the appellant does not contain, as required by rule 24, 'a specification of the errors relied upon.' The intention of that rule is that the

Counsel must also examine the rules of the particular court in which a case is pending with reference to the time allowed for argument and the manner of setting the case for hearing. The general rule is that when a petitioner or appellant is in default for brief when the case is called it may be dismissed on motion.[3] The court has allowed an appellant in default for brief at the time of hearing additional time within which to file a brief under penalty of having the appeal dismissed.[4] When a respondent or appellant is in default the court will hear the counsel for the petitioner or appellant, but will not permit argument by counsel for the respondent or appellee, except on consent of his adversary and by request of the court.[5]

It should be observed that it is the decision of the district judge and the record of the trial before him which is brought into the appellate court for review.[6] On an appeal in equity the whole case is open for review in the appellate court. The statute provides for appeals in bankruptcy "as in equity cases." On an appeal in bankruptcy the whole case is open for review in the appellate court.[7] An appellant will not be allowed to urge error as a ground for reversal unless contained in an assignment of errors as provided by rule 11. An appellee may urge any ground in support of the decision to be reviewed whether it was presented to the court below or not. A judgment may be right although the reasons assigned may not be sound. An appellee will not be permitted to challenge the judgment in any respect unless he has prosecuted a cross-appeal.

On an appeal the appellate court will review both law and

brief shall contain, in the order stated, (1) a statement of the case, (2) a specification of errors relied upon, and (3) a brief of the argument. Each of these should be under an appropriate heading, in enlarged type."

[3] Rule 24, C. C. A.; Portland Co. v. U. S., 15 Wall. 1, 21 L. Ed. 113; Ryan v. Koch, 17 Wall. 19, 21 L. Ed. 611.

[4] Fitch v. Richardson (C. C. A. 1st Cir.), 147 Fed. Rep. 196.

[5] Rule 24, C. C. A.

[6] Vehon v. Ullman (C. C. A. 7th Cir.), 147 Fed. Rep. 694.

[7] B. A. 1898, Sec. 25*a*; Elliott v. Toeppner, 187 U. S. 327, 335, 47 L. Ed. 200, 9 Am. B. R. 50. Merchants Bank v. Cole (C. C. A. 6th Cir.), 150 Fed. Rep. ——.

facts as distinguished from the supervisory jurisdiction where only questions of law are subject to review.[8] Findings of fact, dependent upon conflicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor and will not be set aside or modified unless it clearly appears that there was error or mistake on his part.[9] Where new evidence is introduced before the judge he hears the matter *de novo* and decides the controversy as upon an original hearing, the appellate court will review the proceedings before the judge. If the findings of fact by a judge and a referee differ, the appellate court will ordinarily examine the evidence for itself, but if the findings of fact of a referee and a judge are the same, the facts will not usually be inquired into by the appellate court.

The decree of an appellee court is regularly an affirmance, reversal or modification of the decree of the court below. The decree should provide for the costs and may allow interest in a proper case.[10] It may contain a direction to the court below

[8] Courier-Journal Job Printing Co. v. Brewing Co. (C. C. A. 6th Cir.), 101 Fed. Rep. 699, 4 Am. B. R. 183; Rush v. Lake (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 10 Am. B. R. 455; *In re* Rouse, Hazard & Co. (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234.

In First National Bank v. Title & Trust Co., 198 U. S. 280, 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "But this was an appeal and not a petition for revision, and hence it was that the circuit court of appeals reviewed the questions of fact and declined to accept the findings of the referee and the district court. In the exercise of supervisory power, it would have been confined to matter of law."

[9] Smith v. National Suffolk Bank (C. C. A. 1st Cir.), 127 Fed. Rep. 286, 11 Am. B. R. 506; Barton Bros. v. Texas Produce Co. (C. C. A. 8th Cir.), 136 Fed. Rep. 355, 14 Am. B. R. 502; Southern Pine Co. v. Savannah Trust Co. (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 15 Am. B. R. 608, and cases collated in the opinion.

[10] In Hutchinson v. Otis (C. C. A. 1st Cir.), 115 Fed. Rep. 937, 8 Am. B. R. 382, the court said: "Ordinarily, an appellant, or other party, who has postponed by a proceeding in an appellate tribunal the payment of an amount justly due, should pay damages therefor equal, at least, to legal interest, even if he has not received any increment of the fund corresponding thereto. In Hutchinson v. Le Roy (C. C. A. 1st Cir.), 8 Am. B. R. 20, 113 Fed. 202, we allowed interest against the petitioner; but there the fund

with reference to further proceedings to be taken by the court of bankruptcy. The appellate court does not execute its own decrees, but directs the court of bankruptcy with reference to what should be done by it. The mandate is directed to the particular court which is constituted a court of bankruptcy from which the appeal was taken.

A petition for rehearing may, in the discretion of the court, be allowed at any time during the term, but will not be allowed after the end of the term at which the decree was entered.[11] The proper practice for a party who desires a rehearing is to submit a printed brief or petition or suggestion of the points thought important without oral argument.[12] No reply to the petition is allowed to the other side, nor does the court usually write an opinion when the petition is denied. If the court so desires, it will order the adverse counsel to file a brief, showing why a rehearing should not be granted, or it may order the case to be reheard, or may modify its decree or opinion if it contains incorrect statements.

§ 327. Death of a party.[1]

Whenever, pending a writ of error or appeal in a circuit court of appeals, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in

which it was determined belonged to him, had been held adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, however, the fund came into the hands of the trustee in bankruptcy, not through any tort, but through the oversight of Otis, Wilcox & Co. The trustee merely held it until the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof. Under the circumstances, and as this appeal was taken by the trustee in his official capacity to settle a question involving substantial doubts, we think that interest should not be allowed."

[11] Hudson v. Guestier, 7 Cranch, 1, 3 L. Ed. 249; Rule 29, C. C. A.; Bushnell v. Crooke Min. & Smelting Co., 150 U. S. 83, 37 L. Ed. 1007, and cases there collated.

[12] Public Schools v. Walker, 9 Wall. 603, 19 L. Ed. 650.

[1] Rule 19, C. C. A.

and be admitted parties to the suit, and thereupon the case is heard and determined as in other cases, and if such representatives do not voluntarily become parties then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, is entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record and on hearing have the judgment or decree reversed if it be erroneous: *Provided, however,* that a copy of every such order shall be personally served on said representative at least thirty days before the expiration of such sixty days.

When the death of a party is suggested and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case abates.

When either party to a suit in a circuit or district court of the United States desires to prosecute a writ of error or appeal to a circuit court of appeals from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the suit is dead and has no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but has a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such a writ of error or appeal may procure the same, and may have proceeding on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and thereupon proceeds with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in the appellate court the plaintiff in error or appellant must make a suggestion to the court, supported

by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or the District of Columbia, and stating therein the name and character of such representative and the state or territory or district in which such representative resides; and upon such suggestion he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant is entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous; *Provided, however,* that a proper citation reciting the substance of such order is served upon such representative, either personally or by being left at his residence at least thirty days before the expiration of such ninety days: *Provided also,* that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time, as above required, by the opposite party, the case abates: *And provided also,* that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case proceeds and is heard and determined as in other cases.

§ 327a. Costs in the appellate court.

The question of costs in the appellate court is not governed by any statutory provision. The judgment for costs is awarded in the discretion of the court as justice and right may require.[1] Costs are regularly awarded in favor of the prevailing party[2] or they may be divided in proportion as the court

[1] Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 387, 28 L. Ed. 462; Texas & Pacific Ry. v. Interstate Transportation Co., 155 U. S. 585, 590, 39 L. Ed. 271.

[2] Sup. Ct. Rule 24; C. C. A. Rule 31.

may direct, or neither party may be allowed costs in the appellate court.[3]

Costs are not taxed for or against the United States.[4] In the supreme court the expense of printing the record by the government is taxed against the losing party, except when the judgment is against the United States.[5]

It has often been decided that if a suit is dismissed for want of jurisdiction in the appellate court, no judgment for costs can be given.[6] A different rule prevails when there has been a reversal because the court below did not have jurisdiction, as the appellate court has authority to correct the error of the trial court in taking jurisdicion.[7] The appellate court has power to adjudge costs which are incident to a motion to dismiss, including the amount of the cost of printing the record and the clerk's fees in the appellate court.[8]

The costs are taxed by the clerk from data in his office and no cost bill is required to be filed by counsel. The amount of the costs is included in the mandate and a bill of items taxed in detail is annexed thereto.[9] The costs are collected in the court below, which may issue execution for them if necessary.

The costs in the appellate court include the statutory fees earned by the clerk filing papers, etc.[10] The expense of printing the record, including printed exhibits, answers of respondents to petitions for review when answers are permitted, and the supervision fee prescribed by law for preparing the record for the printer, indexing the same, supervising the printing and distributing the printed records, is taxable as costs.[11]

[3] New England R. R. Co. v. Carnegie Steel Co. (C. C. A. 1st Cir.), 75 Fed. Rep. 54, 21 C. C. A. 210.

[4] Sup. Ct. Rule 24; C. C. A. Rule 31, 90 Fed. Rep. clix.

[5] Act of March 3, 1877, 19 Stat. at L. 344; R. R. Co. v. Collector, 96 U. S. 594, 24 L. Ed. 825.

[6] Strader v. Graham, 18 How. 602, 15 L. Ed. 464; Hornthall v. Collector, 9 Wall. 560, 19 L. Ed. 560.

[7] Turner v. Enrille, 4 Dall. 7, 1 L. Ed. 717; Winchester v. Jackson, 3 Cranch, 514, 2 L. Ed. 516; Mansfield, etc., R. R. Co. v. Swan, 111 U. S. 379, 387, 28 L. Ed. 462.

[8] Bradstreet Co. v. Higgins, 114 U. S. 262, 29 L. Ed. 176.

[9] Sup. Ct. Rule 24, clause 6; C. C. A. Rule 31.

[10] For statutory fees see 169 U. S. 740.

[11] C. C. A. Rule 23; Lee Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48 C. C. A. 760; *Ex parte* Hughes, 114 U.

Where a party cause unnecessary parts of a record to be printed in an appellate court, the court may impose costs upon the guilty party as it thinks proper.[12] An attorney's fee of twenty dollars is taxable in favor of the attorney for the prevailing party.[13]

The following items are not taxable as costs in the appellate court: the amount paid the clerk below for transcript of record, which is properly taxable in the court below as costs in the case;[14] or the amount paid a surety company for furnishing an appeal bond;[15] or disbursements for printing briefs.[16]

§ 328. The mandate.

When a case is finally determined, a mandate or other proper process in the nature of *procedendo* is issued to the court of bankruptcy for the purpose of informing that court of the proceedings in the appellate court, so that further proceedings may be had in court of bankruptcy as to law and justice may appertain.[1] It is not necessary to recite in the mandate every step in the various stages of a cause.[2] It should contain the decree of the appellate court and its directions to the court of bankruptcy.

The court of bankruptcy is bound by the decree contained in the mandate as the law of the case, and must carry it into execution according to the mandate. That court can not

S. 548, 29 L. Ed. 281; Bradstreet Co. v. Higgins, 114 U. S. 262, 29 L. Ed. 176.

[12] Sup. Ct. Rule 10, clause 9; Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431; Ball & Socket Fastener Co. v. Kraetzer, 150 U. S. 111, 1188, 37 L. Ed. 1019; The Sarah (C. C. A. 5th Cir.), 52 Fed. Rep. 233, 3 C. C. A. 56.

[13] Kansas City, etc., R. R. Co. v. McDonald (C. C. A. 8th Cir.), 60 Fed. Rep. 522, 9 C. C. A. 129; Shillito Co. v. McClung (C. C. A. 6th Cir.), 66 Fed. Rep. 22, 13 C. C. A. 284.

[14] C. C. A. Rule 31, clause 3; Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48 C. C. A. 760.

[15] Lee Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep 964, 48 C. C. A. 760.

[16] *Ex parte* Hughes, 114 U. S. 548, 29 L. Ed. 281; Lee Injector Co. v. Penberthy (C. C. A. 6th Cir.), 109 Fed. Rep. 964, 48 C. C. A. 760.

[1] Rule 32, C. C. A.

[2] Andrews v. Thum, 72 Fed. Rep. 290, 18 C. C. A. 566.

vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on the appeal, or intermeddle with it other than to settle so much as has been remanded.[3] If the court of bankruptcy mistakes or misconstrues the decree of the circuit court of appeals and does not give full effect to the mandate, its action may be controlled either by a new appeal or by a writ of mandamus to execute the mandate.[4] The court of bankruptcy may consider and decide any matters left open by the mandate of the appellate court; and its decision of such matters can be reviewed by a new appeal only.[5] The opinion of the appellate court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus or upon a new appeal, it is for the appellate court to construe its own mandate and to act accordingly.[6]

It sometimes occurs that a mandate of the supreme court, directed to a district or circuit court in a case removed by writ of certiorari from a circuit court of appeals, can only be construed on appeal to the circuit court of appeals, because no appeal will lie to the supreme court in the case. The supreme court will usually grant a second writ of certiorari in that case so as to construe its own mandate. This does not follow as a matter of right.

[3] Texas & Pac. Ry. v. Anderson, 149 U. S. 237, 37 L. Ed. 717; Sibbald v. U. S., 12 Pet. 488, 492, 9 L. Ed. 1167.

[4] Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. Rep. 519, 19 C. C. A. 25; *In re* Postal Telegraph Co., 85 Fed. Rep. 853, 29 C. C. A. 456; Perkins v. Fourniquet, 14 How. 313, 330, 14 L. Ed. 435; *In re* Washington & Georgetown R. R., 140 U. S. 91, 35 L. Ed. 339; City Bank v. Hunter, 152 U. S. 512, 38 L. Ed. 534; City Bank Petitioner, 153 U. S. 246, 38 L. Ed. 705.

[5] *In re* Sandford Fork & Tool Co., 160 U. S. 247, 40 L. Ed. 414; Hinckley v. Morton, 103 U. S. 764, 26 L. Ed. 458; Mason v. Pewabic Co., 153 U. S. 361, 38 L. Ed. 745; Nashua & Lowell R. R. v. Boston & Lowell R. R., 51 Fed. Rep. 929, 5 U. S. App. 97.

[6] Gaines v. Rugg, 148 U. S. 228, 238, 244, 37 L. Ed. 432; Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; West v. Brashear, 14 Pet. 51, 10 L. Ed. 350.

GENERAL ORDERS AND FORMS.

GENERAL ORDERS IN BANKRUPTCY.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

See B. A. 1898, Sec. 30.

I.

Docket.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

See secs. 37, 61, *ante*.

II.

Filing of Papers.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

See secs. 31, 37, 61, 137 and 142, *ante*.

Consult *in re* Dean, No. 3699, Fed. Cas., s. c. 1 N. B. R. 249.

As to correcting an erroneous filing, see Alabama, etc., R. Co. v. Jones, No. 127, Fed. Cas., s. c. 7 N. B. R 145.

III.

Process.

All process, summons and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

See secs. 31, 37, 71 and 207, *ante*. Consult also R. S. Secs. 911–913.

IV.

Conduct of Proceedings.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

See secs. 61, 80 and 276, *ante*.

V.

Frame of Petitions.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

See secs. 59 and 69, *ante*.

That an illegible petition can not be filed, see Anon., 1 N. B. R. 215; *In re* Malcom, No. 8986, Fed. Cas., s. c. 4 Law Rep. 488.

That illegible schedules should be amended, *in re* Hall, No. 5922, Fed. Cas., s. c. 2 N. B. R. 192.

That dots can not be used to indicate anything necessary to be stated, *in re* Orne, No. 10582, Fed. Cas., s. c. 1 Ben. 420.

VI.

Petition in Different Districts.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicil, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in

such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

See secs. 68 and 98, *ante*.

Consult *in re* Boston H. & E. R. R. Co., No. 1678, Fed. Cas., s. c. 9 Blatch. 409.

VII.

Priority of Petitions.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

See secs. 68 and 98, *ante*.

VIII.

Proceedings in Partnership Cases.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same

manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defences which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

See sec. 98, *ante*.

IX.

Schedule in Involuntary Bankruptcy.

In all cases of involuntary bankruptcy in which the bankrupt is absent or can not be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

See secs. 33 and 81, *ante*.

As to the duty of the referee to cause such schedules to be filed, see B. A. 1898, Sec. 39, clause 6.

X.

Indemnity for Expenses.

Before incurring any expense in publishing or mailing notices, or in travelling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal

or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

See secs. 36, 38, 40 and 61, *ante*.

Compare B. A. 1898, Secs. 62 and 64*b*, clause 1.

XI.

Amendments.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of error in the paper originally filed.

See secs. 62, 63 and 92, *ante*.

XII.

Duties of Referee.

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

See secs. 29, 62, 77, 99, 103, 294, 206 and 246, *ante*.

Consult *in re* Holmes, No. 6632, Fed. Cas., s. c. 8 Ben. 74; *In re* Hatcher, No. 6210, Fed. Cas., s. c. 1 N. B. R. 390; *In re* Stafford, No. 13274, Fed. Cas., s. c. 13 N. B. R. 378.

XIII.

Appointment and Removal of Trustee.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

See secs. 107 and 142, *ante*.

XIV.

No Official or General Trustee.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

See sec. 142, *ante*.

XV.

Trustee Not Appointed in Certain Cases.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

See secs. 106, 108, 142 and 271, *ante*.

XVI.

Notice to Trustee of His Appointment.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

See secs. 29, 107 and 142, *ante*.

XVII.

Duties of Trustee.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make a report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

See secs. 144, 186 and 264, *ante*.

As to computing the twenty days when property is in litigation, see *in re* Shields, No. 12785, Fed. Cas., s. c. 1 N. B. R. 603.

As to the meaning of "may" in this rule, see *in re* Perdue, No. 10975, Fed. Cas., s. c. 2 N. B. R. 183.

As to filing exceptions, see *in re* Perdue, No. 10975, Fed. Cas., s. c. 2 N. B. R. 183; *In re* Gainey, No. 5181, Fed. Cas., s. c. 2 N. B. R. 525; *In re* Jackson, No. 7127, Fed. Cas., s. c. 2 N. B. R. 508.

XVIII.

Sale of Property.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

See secs. 259 and 260, *ante*.

XIX.

Accounts of Marshal.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

See sec. 40, *ante*.

As to fees, see B. A. 1898, Sec. 52*b*; R. S. Sec. 829; act of May 28, 1896, Sec. 6, 29 Stat. at L. 179.

As to the necessity of producing vouchers, or explaining why they are omitted, see *in re* Comstock, No. 3075, Fed. Cas., s. c. 9 N. B. R. 88; *In re* Donahoe, No. 3979, Fed. Cas., s. c. 8 N. B. R. 453. But see *in re* Talbot, No. 13727, Fed. Cas., s. c. 2 N. B. R. 280.

XX.

Papers Filed After Reference.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

See secs. 29, 103 and 137, *ante*.

XXI.

Proof of Debts.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and there-

after, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination,

and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

See secs. 105, 131, 133, 140, 207 and 265, *ante*.

As to re-examination of claims, *in re* Lount, No. 8543, Fed. Cas., s. c. 11 N. B. R. 315; *In re* Robinson, No. 11938, Fed. Cas., s. c. 8 Ben. 406; Canby v. McLear, No. 2378, Fed. Cas., s. c. 13 N. B. R. 22.

XXII.

Taking of Testimony.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

See secs. 31, 34, 140 and 208, *ante*.

XXIII.

Orders of Referee.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

See sec. 29, *ante*.

XXIV.

Transmission of Proved Claims to Clerk.

The referee shall forthwith transmit to the clerk a list of the claims proved againt an estate, with the names and addresses of the proving creditors.

XXV.

Special Meeting of Creditors.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

See sec. 108, *ante*.

XXVI.

Accounts of Referee.

Every referee shall keep an accurate account of his travelling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

See sec. 36, *ante*.

XXVII.

Review by Judge.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

See secs. 29, 30, 32*a*, 34, 62, 63, 90, 92, 105, 141 and 208, *ante*.

XXVIII.

Redemption of Property and Compounding of Claims.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

See secs. 253, 256 and 263, *ante*.

XXIX.

Payment of Moneys Deposited.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

See sec. 269, *ante*.

XXX.

Imprisoned Debtor.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailor or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

See secs. 204, 218 and 226, *ante*.

The statute (Sec. 9) provides for an exemption from arrest except upon process founded upon "a debt or claim from which his discharge would not be a release." Many debts are provable which are not released. The statute undoubtedly controls. See Sec. 218, *ante*. The same discrepancy existed between the statute of 1867 and General Order 27, promulgated under that act. In repeated decisions under that act the rule was laid down that if the debt was one from which a discharge was not a release, the bankrupt could not be released from imprisonment if the arrest was based upon such a debt, *In re* Robinson, 6 Blatch. 253, s. c. 36 How. Pr. 176; *In re* Patterson, 2 Ben. 155, s. c. No. 10817, Fed. Cas.; *In re* Boyst, 2 B. R. 171; *In re* Kimball, No. 7769, Fed. Cas., s. c. 6 Blatch. 292; s. c. below, No. 7768, Fed. Cas., s. c. 2 Ben. 554; *In re* Whitehouse, 1 Lowell, 429, s. c. No. 17564, Fed. Cas.; *In re* Migel, No. 9538, Fed. Cas., 2 B. R. 481; *In re* Seymour, Fed. Cas. No. 12684, s. c. 1 Ben. 348; *In re* Williams, 6 Biss., 233, s. c. No. 17700, Fed. Cas.

XXXI.

Petition for Discharge.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

See sec. 273, *ante*.

XXXII.

Opposition to Discharge or Composition.

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

See secs. 247, 275, 276 and 277, *ante*.

Consult *in re* Grefe, No. 5794, Fed. Cas., s. c. 2 N. B. R. 329; *In re* Baum, No. 1116, Fed. Cas., s. c. 1 Ben. 274; *In re* McVey, No. 8932, Fed. Cas., s. c. 2 N. B. R. 257.

XXXIII.

Arbitration.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

See secs. 253 and 263, *ante*.

XXXIV.

Costs in Contested Adjudication.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

See sec. 88, *ante*.

XXXV.

Compensation of Clerks, Referees and Trustees.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in travelling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings

in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. He may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees and trustees to be paid immediately after such commissions accrue and are earned (*as amended December* 11, 1905, 199 U. S. 618).

See secs. 38, 61 and 148, *ante*.

XXXVI.

Appeals.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

See Chapter XXVII.

XXXVII.

General Provisions.

In proceedings in equity, instituted for the purpose of

carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supeme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to faciliate a speedy hearing.

XXXVIII.

Forms.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

See secs. 59, 60, 69 and 133, *ante*.

Consult *in re* Sallee, No. 12256, Fed. Cas., s. c. 2 N. B. R. 228.

BANKRUPTCY.

PETITIONS, SCHEDULES ADJUDICATION AND ORDER OF REFERENCE.

No. 1.

Debtor's Petition (1).

(Official Form No. 1.)

To the Honorable ——, Judge of the District Court of the United States, for the —— District of ——:

The petition of ——, of ——, in the county of ——, and district and state of ——, —— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or,* has resided, *or,* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ——, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts;

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——.

——, Attorney.

United States of America, District of ——, ss.

I, ——, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief. ——,

Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. (2.)

[*Official character.*]

(1) See Gen. Ords. 5 and 11. B. A. 1898, Sec. 4. As to who may be bankrupts see Loveland's Bankruptcy, sec. 42 *et seq.*

As to the district in which petition should be filed, see *in re* Williams, 99 Fed. Rep. 544, 3 Am. B. R. 677; *in re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *in re* Waxelbaum, 97 Fed. Rep. 562, 3 Am. B. R. 267.

As to the form of petition, see Mahoney *vs.* Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770.

A creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition by setting up that the petitioner is not insolvent. *In re* Carleton, 8 Am. B. R. 270, Fed. Rep.

(2) Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt Act of 1898, ch. 4, sec. 20.

The oath should be made by the petitioner or some one familiar with the facts. *In re* Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. *vs.* Stengel (C. C. A. 6 Cir.) 95 Fed. Rep. 637, 2 Am. B. R. 283; *in re* Chequasset Bank, 7 Am. B. R. 87; Green River Deposit Bank *vs.* Craig Bros., 6 Am. B. R. 381.

No. 2. **Schedule A.—Statement of all Debts of Bankrupt.**

In the District Court of the United States for the —— District of ——.

In the matter of A. B., Bankrupt. } In Bankruptcy, No. ——.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

N. B.—Claims are to be entered in the following order, viz.: (1).—Taxes and debts due and owing to the United States. (2).—Taxes due and owing to the state, or to any county, district, or municipality. (3).—Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition. (4).—Other debts having priority by law.

This sheet must be signed by the bankrupt at the end of the statement.

REFERENCE TO LEDGER OR VOUCHER.	NAMES AND RESIDENCES OF CREDITORS. IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	WHERE AND WHEN CONTRACTED.	NATURE AND CONSIDERATION OF DEBT, AND WHETHER CONTRACTED AS PARTNER OR JOINT CONTRACTOR; AND IF SO, WITH WHOM.	AMOUNT.
			Taxes and debts to United States.	$ —— ——
			State and county taxes payable to Treasurer of —— county, ——.	—— ——
15	C. D. No. —— —— St. ——.	At ——, from —— —— 190—, to —— —— 190—.	For wages as clerk.	—— ——
15	E. F. No. —— —— St. ——.	At ——, from —— —— 190—, to —— —— 190—.	For wages as laborer.	—— ——
	I owe no other debts having priority by law.		Total	$ —— ——
			A. B., Petitioner.	

Schedule A. (2)

Creditors Holding Securities.

N B.— Particulars of securities held, with date of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by Acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.
This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of creditors. If residence unknown that fact must be stated.	Description of securities.	When and where debts were contracted.	Value of securities.	Amount of debts.
42	S. Trust Co., ——— Bldg., ———, ———.	Mortgage on lots —— and ——, —— subdivision ———, ——.	At ———, ———. ———, —— 190—.	$ ——— ———	$ ——— ———
57	——— Nat. Bank. ———, ———.	—— shares stock of Z. F. Co., held as collateral.	At ———, ———. ———, —— 190—.	——— ———	——— ———
			Total	$ ——— ———	$ ——— ———
			A. B., Petitioner.		

Schedule A. (3)

Creditors Whose Claims are Unsecured.

N. B.— When the name and residence [*or* either] of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.
This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of creditors. If residence unknown, that fact must be stated.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.	Amount.
18	G. H. No. —— —— St.	——— ——, 190—. At ——— ——.	Merchandise.	$ —— ——
24	J. J. No. —— —— St.	——— ——, 190—. At ——— ——.	Professional services.	—— ——
			The above were contracted by me individually. The following were contracted by me as partner in the firm of A. B. & Co., and for which the other partners, X. Y. and W. Z., are liable jointly with me..	
134	L. K. No. —— —— St.	——— —— 189— at ——— ——	Merchandise.	—— ——
17	M. N. No. —— —— St.	——— —— 189— at ——— ——	Evidenced by promissory note of A. B. & Co.	—— ——
			Total.....	$ —— ——
			A. B., Petitioner.	

SCHEDULE A. (4)

Liabilities on Notes or Bills Discounted, which ought to be paid by the Drawers, Makers, Acceptors, or Indorsers.

N. B.— The dates of the notes or bills, and when due, with their names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.
This sheet should be signed by the bankrupt at the end of the statement.

REFERENCE TO LEDGER OR VOUCHER.	NAMES AND RESIDENCES OF HOLDERS AS FAR AS KNOWN. IF RESIDENCE UNKNOWN, THAT FACT MUST BE STATED.	PLACE WHERE CONTRACTED.	NATURE OF LIABILITY, WHETHER SAME WAS CONTRACTED AS PARTNER OR JOINT CONTRACTOR, OR WITH ANY OTHER PERSON; AND IF SO, WITH WHOM.	AMOUNT.
	C. Bank, ———, ———.	———, ———.	Note of R. D., endorsed to said holder by said firm of A. B. & Co., of which X. Y., and W. Z. were the other partners. A. B., Petitioner.	$ ——— ———

Schedule A. (5)

Accommodation Paper.

N. B.— The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.
This sheet should be signed by the bankrupt at the end of the statement.

Reference to ledger or voucher.	Names and residences of holders. If residences unknown, that fact must be stated.	Names and residences of persons accommodated.	Place where contracted	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
	P. Q. No. ——— ——— St. ———, ———.	R. S. No. ——— ——— St. ———, ———.	———	Liable individually.	$ ——— ———
	T U. No. ——— ——— St. ———, ———.	V. W. & Co. No. ——— ——— St. ———, ———.	———	Liable jointly with X. Y. and W. Z., as partner in firm of A. B. & Co.	$ ——— ———
				Total	$ ——— ———

A. B.,
Petitioner.

OATH TO SCHEDULE A.

United States of America, District of ——, ss.

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this —— day of ——, A. D. 18—. —— ——,

(1) Loveland's Bank., secs. 60 and 81.

[Official character.]

No. 3.

Schedule B.—Statement of all Property of Bankrupt.

In the District Court of the United States for the —— District of ——.

In the matter of A. B., Bankrupt. } In Bankruptcy, No. ——.

SCHEDULE B. (1)
Real Estate.

N. B.— This sheet must be signed by the bankrupt at the end of the statement.

LOCATION AND DESCRIPTION OF ALL REAL ESTATE OWNED BY DEBTOR, OR HELD BY HIM.	INCUMBRANCES THEREON, IF ANY, AND DATES THEREOF.	STATEMENT OF PARTICULARS RELATING THERETO.	ESTIMATED VALUE.	
Lots —— and —— in —— subdivision, ——, ——, together fronting —— feet on —— side of —— street, and running back —— feet to alley.	Mortgage of $—— to S. Trust Co., dated —— ——, 190—.	Said mortgage given by A. Z. and assumed by me.	$ ——	——
Tract of —— acres in N. E. quarter of sect. ——. T——, R——, —— county, ——, more particularly described in deed recorded in said county in Deed Book ——, page ——.	No incumbrances.		$ ——	——
			$ ——	——
		Total	$ ——	——
		A. B... Petitioner.		

Schedule B. (2)

Personal Property.

N. B.— This sheet must be signed by the debtor at the end of the statement.

A. Cash on hand,	$ ———	——
B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).		
Promissory note of B. R., endorsed by X. Z.,	$ ———	———
C. Stock in trade in my business of dry goods merchant ——— at ——— of the value,	$ ———	———
D. Household goods and furniture, household stores, wearing apparel, and ornaments of the person, viz., all situated at No. ——— ——— St., ———, ——, valued at,	$ ———	———
E. Books, prints, and pictures, viz., family pictures at No. ——— ——— St., ———, ———, valued at,	$ ———	———
F. Horses, cows, sheep, and other animals (with number of each), viz.,	None.	
G. Carriages, and other vehicles, viz.,	None.	
H. Farming stock, and implements of husbandry, viz.,	None.	
I. Shipping, and shares in vessels, viz.,	None.	
K. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz.,	None.	
L. Patents, copyrights, and trade-marks, viz.,	None.	
M. Goods or personal property of any other description, with the place where each is situated, viz.,	None.	
Total,	$ ———	———

A. B.,
Petitioner.

Schedule B. (3)

Choses in Action.

N. B.— This sheet must be signed at the end thereof by the debtor.

A.	Debts due petitioner on open account, as follows:	
	J. S. ——— —— $ ——— ——	
	L. R. ——— —— $ ——— ——	
	M. P. ——— —— $ ——— ——	
	\ ——— ——	
		$ ——— ——
B.	Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds, as follows: —— shares stock of Z. F. Co.	
	The above are held as collateral security by —— National Bank of —— —— as set forth in Schedule A (2).	$ ——— ——
C.	Policies of Insurance, as follows:	
	No. —— in N. Y. L. Co. surrender value.	$ ——— ——
	No. —— in N. Y. Z. Co. surrender value.	None.
D.	Unliquidated Claims of every nature, with their estimated value, as follows:	None.
E.	Deposits of money in banking institutions and elsewhere, as follows:	None.
	Total,	$ ——— ——

A. B.

Schedule B. (4)

Property in reversion, remainder, or expectancy, including proprty held in trust for the debtor or subject to any power or right to dispose of or to charge.

N. B.— A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor. This sheet must be signed at the end thereof by the debtor.

GENERAL INTEREST.	PARTICULAR DESCRIPTION.	SUPPOSED VALUE OF MY INTEREST.
Interest in land,	A beneficial interest under will of J. B. to house and lot on V. St. ——— —— held by M. Trust Co. in trust for C. B. for life with remainder after her death to A. B., G. B. or the survivor.	$ ——— ——
Personal property,		None.
Property in money, stocks, shares, bonds, annuities, etc.		None.
Rights and powers, legacies and bequests.		None.
	Total,	$ ——— ——

PROPERTY HERETOFORE CONVEYED FOR BENEFIT OF CREDITORS.	AMOUNT REALIZED FROM PROCEEDS OF PROPERTY CONVEYED.
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor.	None.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	$ —— ——
Total.	$ —— ——

A. B.

Schedule B. (5)

A particular statement of the property claimed, as exempted from the operation of the Acts of Congress relating to Bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

N. B.— This sheet must be signed by the debtor at the end of the statement.

Military uniforms, arms, and equipments.	None.
Property claimed to be exempted by State laws, its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption, as follows:	
All household furniture, household stores and wearing apparel and family fixtures claimed by me as a married man, the head and support of a family, under section —— Revised Statutes of ——.	$ —— ——
Total,	$ —— ——

A. B.

Schedule B. (6)

Books, Papers, Deeds, and Writings relating to Bankrupt's Business and Estate.

N. B.— This sheet must be signed at the end thereof by the debtor.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Journal, ledger, cash book, and bank book.

Deeds.

Deed to lots —— and —— ——— subdivision.

2 deeds for —— acre tract N. E. ¼ sect. —— T—— R——.

Papers. None.

A. B.

OATH TO SCHEDULE B.

United States of America, District of ——, ss.

On this —— day of ——, A. D. 18—, before me personally came —— ——, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

——, [*Official character.*]

(1) Loveland's Bank. secs. 60 and 81. Gen. Ord. 38; Mahoney *vs.* Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770.

Schedules should not be filed with judge or referee but with the clerk. *In re* Sykes, 106 Fed. Rep. 669.

SUMMARY OF DEBTS AND ASSETS.

[From the statement of the bankrupt in Schedules A and B.]

Schedule A....	1 (1)	Taxes and debts due United States			
" "....	1 (2)	Taxes due states, counties, districts, and municipalities.....			
" "....	1 (3)	Wages			
" "....	1 (4)	Other debts preferred by law....			
Schedule A....	2	Secured claims			
Schedule A....	3	Unsecured claims			
Schedule A....	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A....	5	Accommodation paper			
		Schedule A, total.....			
Schedule B....	1	Real estate			
Schedule B....	2-a	Cash on hand.....			
" "....	2-b	Bills, promissory notes, and securities			
" "....	2-c	Stock in trade.....			
" "....	2-d	Household goods, etc.....			
" "....	2-e	Books, prints, and pictures.....			
" "....	2-f	Horses, cows, and other animals..			
" "....	2-g	Carriages and other vehicles.....			
" "....	2-h	Farming stock and implements...			
" "....	2-i	Shipping and shares in vessels....			
" "....	2-k	Machinery, tools, etc.....			
" "....	2-l	Patents, copyrights, and trademarks			
" "....	2-m	Other personal property.....			
Schedule B....	3-a	Debts due on open accounts.....			
" "....	3-b	Stocks, negotiable bonds, etc.....			
" "....	3-c	Policies of insurance.....			
" "....	3-d	Unliquidated claims			
" "....	3-e	Deposits of money in banks and elsewhere			
Schedule B....	4	Property in reversion, remainder, trust, etc.			
Schedule B....	5	Property claimed to be excepted..			
Schedule B....	6	Books, deeds, and papers.....			
		Schedule B, total.....			

No. 4.

Partnership Petition (1).

(Official Form No. 2.)

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The petition of —— respectfully represents:

That your petitioners and —— have been partners under the firm name of ——, having their principal place of business at ——, in the county of ——, and district and state of ——, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and

such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said —— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm [2] may be

adjudged by a decree of the court to be bankrupts within the purview of said acts.

——,
——,
——,
Petitioners.

——, Attorney.

——, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of their knowledge, information and belief.

——,
——,
——,
Petitioners.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]
——.

[Schedules to be annexed corresponding with schedules Nos. 2 and 3.]

(1) See Loveland's Bank. sec 96 *et seq.* Gen. Ords. 5 and 7.
(2) If it is desired to have the partners adjudged bankrupt—insert the words at this point, as follows: "and the several partners constituting said firm."

No. 5.
Creditor's Petition.[1]
(Official Form No. 3.)

To the Honorable ———, Judge of the District Court of the United States for the —— District of ——:

The petition of ——, of ——, and ——, of ——, and ——, of ——, respectfully shows:

That ——, of ——,[2] has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business [*or* resided *or* had his domicile] at ——, in the county of ——, and state and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said —— is insolvent, and that within four months next preceding the date of this petition the said —— committed an act of bankruptcy, in that he did heretofore, to-wit, on the —— day of

---

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon ——, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——,
——,
——,
Petitioners.

——. Attorney.

United States of America, District of ——, ss.

——, ——, ——, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

Before me, ——, this —— day of ——, 189—.

——,
——.
[*Official character.*]

[Schedules to be annexed (filed by bankrupt) corresponding with schedules Nos. 2 and 3.]

(1) Loveland's Bank, sec. 66 *et seq.* Gen. Ords. 5 and 7.

(2) In case the debtor is an individual the following words should be inserted at this point: "is not a wage earner or engaged chiefly in farming or the tillage of the soil, but is a person subject to be adjudged a bankrupt upon a creditors' petition."

In case the debtor is a corporation the following words should be inserted at this point: "is a corporation existing under the laws of the state of ——, engaged principally in manufacturing" (*or* trading, *or* printing, *or* publishing, *or* mining, *or* mercantile pursuits, *or as the fact may be*).

No. 6.

Affidavit by Attorneys to Creditor's Petition.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Charles M. Leslie and John Ledyard Lincoln, who severally made solemn oath that they are attorneys and counselors-at-law of the Supreme Court of the state of Ohio and of the District, Circuit and Circuit Court of Appeals of the Southern District of Ohio, and that said John Ledyard Lincoln is a counselor-at-law admitted to practice in the Supreme Court of the United States, and that they are the attorneys and agents of the said petitioners in all matters recited in and relating to the said petition; that they have read the foregoing petition and know the contents thereof, and that the facts stated therein are true; that their sources of information and the grounds of their belief are among other things, examination of the original notes recited in the said petition; examination of the books of the said The Chequasset Lumber Company now in the possession of the said receiver, Eugene F. Perry, at 66 Broadway, in the city, county and state of New York; statements made to them by the officers of the said petitioning banks and by the said receiver; that the reason this affidavit is made by the said Leslie and Lincoln is that each of the said petitioners is a corporation organized under the laws of the United States, having its only office and place of business in Cincinnati, Ohio, more than 100 miles from the city of New York, and having no officer within this judicial district; and

that they have full authority from the said petitioning banks and have been authorized by them to make this affidavit.

Charles M. Leslie.
John Ledyard Lincoln.

Sworn to before me this 14th day of November, 1901.
[*Seal.*] John A. Valentine,
Notary Public, Kings Co.

Certificate filed in N. Y. County.

United States of America, Southern District of New York, City, County and State of New York, ss.

On this 14th day of November, 1901, before me personally appeared Henry Melville, who made solemn oath that he is an attorney-at-law duly admitted to practice in the District Court of the United States for the Southern District of New York, and the attorney of record of the foregoing petitioning creditors; that he has read the foregoing petition in bankruptcy and knows the contents thereof, and that the facts stated therein are true; that the sources of his information as to the truth of said facts are the statements made to him by Charles M. Leslie and John Ledyard Lincoln, attorneys and counselors-at-law, residing in the city of Cincinnati and state of Ohio, attorneys and general counsel for the said petitioners; that the said statements have been made under oath, as appears by the foregoing affidavits and otherwise; that the reason this verification is not made by the petitioners is that each of the petitioners is a corporation organized under the laws of the United States, having its principal and only place of business in Cincinnati, Ohio, more than one hundred miles from the city of New York, and having no officer within this judicial district; and that the deponent has been duly authorized to make this verification. Henry Melville.

Sworn to before me this 14th day of November, 1901.
[*Seal.*] John A. Valentine,
Notary Public, Kings Co.

Certificate filed in N. Y. County.

(1) This affidavit was held sufficient *in re* Chequasset Lumber Co., 7 Am. B. R. 87.

That an attorney may make affidavit when familiar with the facts, see also *in re* Nelson, 98 Fed. Rep. 76; Leidigh Carriage Co. *vs.* Stengel, 95 Fed. Rep. 637; 2 Am. B. R. 283; Green River Deposit Bank *vs.* Craig Bros., 6 Am. B. R. 381.

No. 7.

Order to Show Cause upon Creditors' Petition.

(Official Form No. 4.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

Upon consideration of the petition of —— that —— be declared a bankrupt, it is ordered that the said —— do appear at this court, as a court of bankruptcy, to be holden at ——, in the district aforesaid, on the —— day of ——, at —— o'clock in the ——noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said ——, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

No. 8.

Subpoena to Alleged Bankrupt (1).

(Official Form No. 5.)

United States of America, —— District of ——. To ——, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ——, in said district, on the —— day of ——, A. D. 190—, —— to answer to a petition filed by —— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the honorable ——, judge of said court, and the seal thereof, at ——, this —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

(1) Seen Gen. Ord. 3; R. S. secs. 911 and 912; B. A. 1898, sec. 18*a*. Loveland's Bank., secs. 71-76. Eq. Rule 13.

Secs. 18 *a* and *b* of the Bankruptcy Act were amended by the act of February 5, 1903, to read as follows:

"*a*. Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the

return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

"*b.* The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow."

As to the effect of a voluntary appearance, see *in re* Columbia Real Estate Co., 101 Fed. Rep. 965.

As to the practice in bankruptcy when service is made by publication, see *in re* Murray, 96 Fed. Rep. 600, 3 Am. B. R. 301.

As to effect of service beyond the jurisdiction of the court, *in re* Appel, 103 Fed. Rep. 931, 2 N. B. N. 907.

No. 9.

Denial of Bankruptcy (1).

(Official Form No. 6.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of } In Bankruptcy.
—— —— ——
—— —— ——

At ——, in said district, on the —— day of ——, A. D. 190—.

And now the said —— appears and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or,* he demands that the same may be inquired of by a jury].

——.

Subscribed and sworn to before me this day of ——, A. D. 190—.

——,
[*Official character.*]

(1) B. A. 1898, sec. 19. Loveland's Bank., sec. 83.

The debtor may set up any defense which tends to prevent an adjudication, *in re* Paige, 99 Fed. Rep. 538; Mather *vs.* Coe, 92 Fed. Rep. 333; *in re* Etheridge Furniture Co., 92 Fed. Rep. 329.

No. 10.

Order for Jury Trial (1).

(Official Form No. 7.)

In the District Court of the United States
For the —— District of ——.

—— —— ——	
In the matter of	In Bankruptcy.
—— —— ——	
—— —— ——	

At ——, in said district, on the —— day of ——, 19—.

Upon the demand in writing filed by ——, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered that said issue be submitted to a jury.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 19. Loveland's Bank., sec. 87.

Day *vs.* Beck & Gregg Hardware Co., 8 Am. B. R. 175; Mattoon Nat. Bank, 102 Fed. Rep. 728; 4 Am. B. R. 515; Leidigh Carriage Co. *vs.* Stengel, 95 Fed. Rep. 637, 2 Am. B. R. 283; *in re* Bauman, 96 Fed. Rep. 946, 3 Am. B. R. 196.

A bankruptcy proceeding is in equity, and does not fall within the seventh amendment to the Constitution, governing the right of trial by jury, which can be had in bankruptcy only under the provisions of sec. 19 of the Bankruptcy Act. Elliott *vs.* Toeppner (Sup. Ct.), 9 Am. B. R. 50. *In re* Christensen, 101 Fed. Rep. 243, 4 Am. B. R., 99; the only issues to be submitted as of right to a jury are those of insolvency, and the fact of an act of bankruptcy in involuntary proceedings as provided in sec. 19. Simonson *vs.* Sinsheimer, 3 Am. B. R. 824 (C. C. A., 6th Cir.), 100 Fed. Rep. 426.

As to the right to a trial by jury, see *in re* Rude, 4 Am. B. R. 319; Day *vs.* Hardware Co., 8 Am. B. R. 175.

No. 11.

Answer to Creditor's Petition (1).

The District Court of the United States for the —— District of ——.

In the matter of E. F. & Co., F. Brothers, and N. & Co., Petitioners,

vs.

A. B. & Company, Respondents.

Joint plea of the defendant, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company.

The defendants, A. B., C. B. and D. B., partners under the firm name and style of A. B. & Company, by protestation, not confessing nor acknowledging all or any of the matters or things in the said petition of said petitioners mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged, for plea to the whole of said petition:

These defendants say that said petitioners are not, nor is either of them, creditors or a creditor in the manner or form alleged in their said petition, of these defendants or their said firm, and that the alleged demands of said petitioners mentioned and referred to in their said petition, are not provable against defendants or their said firm as in petition alleged, nor do the alleged demands of said petitioners against defendants' firm amount to $——, and that the petitioners, E. F. & Company, were not at the time of filing said petition herein, entitled to demand of defendants' firm for the alleged sale or delivery referred to in petition, the sum of $——, nor any other sum on account of said alleged sale or delivery, nor is said sum of $——, or any other sum for the alleged sale and delivery of said goods, due to said petitioners, E. F. & Company. That the petitioners, F. Bros., had no such demand as set forth in petition, nor had the demand amounting

to $——, nor was that sum, or any other sum, due from defendants' firm to said F. Bros. for said goods, nor for the alleged sale or delivery referred to in petition by F. Bros. to defendants' firm. That the petitioners, N. & Company, had no such demand as set forth in said petition for any goods, wares or merchandise sold or delivered, amounting in the aggregate to $——, or any other such sum due, owing or unpaid for any such sale or delivery of goods.

These defendants further say that heretofore, to wit, several months before this proceeding was instituted, to wit, on ——, an action in equity was instituted in the Circuit Court for the county of —— and state of ——, at ——, in and by which the defendant, L. C., as trustee, was plaintiff, and these defendants and all creditors of these defendants and their said firm were defendants, in which said L. C. set forth the assignment for the benefit of creditors, and sued for a settlement of his trust as assignee thereunder, and that in that settlement suit all of the petitioners in this proceeding, long before the institution of this proceeding, were parties defendant, and entered their appearance and filed their claims therein, and have ever since such entry of their appearance been at all times and are now parties to said settlement suit in said Circuit Court of —— county, ——, therein suing and seeking in the state court to recover their proportion, as creditors of defendants' firm, of the assets of defendants' firm so assigned, which proportion would be the same proportion that they would obtain if said estate were distributed in bankruptcy in this court; they have never dismissed their proceeding in said court, but were, at the time of the institution of this proceeding, and still are, seeking to recover in said action their proportionate share of the proceeds of said estate as creditors thereof, and that before the service of process or any notice or information of this proceeding the defendant, L. C., as assignee of these defendants, under orders of the —— Circuit Court, which had jurisdiction of the estate, the parties and the action

at that time, paid into court into the hands of the receiver of the court, and deposited in court in said action, all of the funds in his hands, to wit, all of the proceeds of the estate of these defendants so assigned to him for the benefit of creditors, and all of said funds have been ever since and now are in said court in said action in the actual control and custody of the court for distribution therein, and but for the proceedings in this court would be ready now for prompt distribution among the creditors in the same proportion and in the same manner that they would be distributed here, without the extra costs of the proceedings in this court, and these defendants rely on and plead said other action, suit and proceeding in the Circuit Court of —— county, in the state of ——, in bar and estoppel of petitioners' claim herein, and as a good and valid defense to said proceeding.

These defendants further state that before the institution of this proceeding, there was an agreement and composition offered by defendants' said firm to their creditors, including the petitioners in this proceeding, at the rate of fifty cents on the dollar, which proposition was offered by defendants to petitioners and other creditors and accepted by petitioners, and almost all of the creditors of defendant, and that as between defendants' firm and petitioners, the original indebtedness and obligation was by said agreement of composition terminated, and the right of petitioners against said defendants' firm is no longer upon the original accounts, sale or delivery of goods and original indebtedness, but upon the contract or composition and compromise agreed upon between defendants' firm and said petitioners and other creditors of defendants' firm.

These defendants further say that this proceeding was not instituted, nor has it ever been prosecuted in good faith on behalf of the petitioners or any of them for the relief afforded by the National Bankruptcy Law of 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," but was instituted for sinister, oppressive and

vicious purposes, this proceeding being part of a plan or scheme begun by petitioners in 1898 for the avowed purpose of forcing defendants and their said firm to pay said petitioners more than other parties claiming to be creditors of defendants' firm, were to receive any more than the assigned estate could pay.

These defendants further state that in December, ——, the defendant, L. C., as assignee of defendants' firm, filed said suit in the —— Circuit Court of the state of ——, asking as aforesaid, a settlement of his accounts and distribution of the proceeds of the assigned estate among the creditors of defendants' firm, without preference as provided by the laws of ——, that the petitioners in this proceeding, as parties to said suit, joined therein and united in an order entered in that action, referring said action in the —— Circuit Court to the commissioner of said court as a Commissioner in Chancery to make a settlement of the accounts to said L. C., as assignee, and a distribution among the creditors; that excepting a few outstanding accounts of little or no value, all of the assets of defendants' said firm assigned to said L. C. have long since been converted into money and the proceeds paid into court as hereinbefore set forth, for distribution; that said court is now, and has been for some time, ready to distribute said fund ammong the creditors in the same proportion, and with the same respective legal rights as they would be distributed in this court, and in this proceeding, if the funds should be brought into this court, waiting only for the time for creditors to present their claims as required by law, to pass, which time expired ——. That the proceedings herein were taken and the petition of petitioners herein filed long after said State Court had taken and exercised complete jurisdiction and control of the defendants' said firm and their said estate assigned to said L. C., and of the said assignment and all of the claims of all of the creditors of defendants' said firm, and of all the estate of defendants' said firm, and had all of the

transactions, property and parties under its jurisdiction and control, and of all of the proceeds of all of its property in its possession, and was ready to distribute the proceeds and long after the assignee had paid the said proceeds into court in that proceeding, where the same now remains, and that neither these defendants nor said L. C., nor either of them, has or has ever had since the time of the filing of petition of petitioners herein, any possession or control of said estate, or any part thereof, or of the proceeds thereof, all of which matters and things these defendants do aver and plead to the petitioners' said petition, and humbly crave whether they shall make any further answer to the said petition.

And these defendants not waiving their said pleading, but relying thereon, for answer to the said bill and in support of said plea say that they and each of them know not and have not been informed save by said petitioners' said petition, and cannot set forth as to their belief or otherwise; that the petitioners were partners as set forth in petition, and they deny that the demands of petitioners set forth in petition were or are provable against defendants' firm in accordance with the provisions of the Act referred to in said petition, or at all; deny that the demands of petitioners against defendants' firm exceeded $——, or any other sum above $——, and deny that petitioners, or either of them, at the time of filing the petition in this proceeding, had any such claim or demand as set forth in petition, or any other claim or demand excepting a claim upon the contract and agreement between petitioners and defendants' firm, to compromise at fifty cents on the dollar. They deny that the defendant, L. C., had at the time of the filing the petition herein, or has now, the sum of $——, or any other sum, realized from the said assigned estate or any proceeds of the said assigned estate.

These defendants, for further answer herein, state that they are advised and believed that neither the petitioners, nor either of them, nor any creditor of these defendants, desires

the court to proceed further on said petition in involuntary bankruptcy; that no creditor has applied to the court for an adjudication in bankruptcy; that the matter was not brought to the court's attention by any creditor, but was brought to the court's attention without the intervention or desire or suggestion of any creditor by some one of the officers of the court, and not for the benefit of any creditor.

These defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said petition charged, without this, that there is any other matter, cause or thing in said petition contained, material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avowed or deny, is true to the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Y. & Y.,
Attorneys for Defendants.

State of ——, County of ——, ss.

A. B., makes solemn oath and says he is the above named defendant; so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

A. B.

Sworn to before me this —— day of ——.

[*Seal.*]

N. R., Notary Public,
—— County, ——.

(1) See note to No. 9.

No. 12.

Petition of Administrator of Deceased Partner Asking Leave to Settle Partnership Affairs (1).

District Court of the United States, —— District of ——.

In re A. B. & Co.

To the Honorable E. S., Judge of the District Court of the United States for the —— District of ——.

The petition of the Memphis Trust Company, administrator of A. B., deceased.

Petitioner respectfully shows that it was appointed administrator of A. B., deceased, by the Probate Court of —— county, ——, at its August Term, ——. It files herewith certified copies of its letters of administration.

It shows further that the said A. B. was the senior member of said firm of A. B. & Co., referred to in the original petition herein. It shows further that the individual assets, real and personal, of the said A. B., deceased, together with the partnership assets of the said firm of A. B. & Co. will, as it verily believes, be more than sufficient to pay all of the individual debts of the said A. B., and the firm liabilities of A. B. & Co. It shows further that before the petition in bankruptcy was filed herein against the said C. B. and D. B., it had taken steps in the Chancery Court of —— county, ——, to have the partnership property and assets of said firm of A. B. & Co., administered by said Chancery Court. On its application said Chancery Court of —— county, ——, appointed a receiver for said partnership assets on the —— day of ——, and said receiver was in charge of said assets when the petition in bankruptcy was filed in this cause.

Petitioner now presents this petition to this honorable court for the purpose of showing that as administrator of said A. B., deceased, it does not consent if said C. B. and D. B. are adjudged bankrupts, that partnership property shall be administered in bankruptcy.

Petitioner shows further that at its instance and on its application said partnership business is now being settled through said receivership mentioned above as expeditiously as its nature will permit.

Petitioner now asks leave to file this petition herein, and thereby set up its right to settle said partnership business in the manner set forth above.

Turley & Wright,
Solicitors for Mem. Trust Co., Admr.

(1) Taken from the record in Vaccaro *vs.* Security Bank, 103 Fed. Rep. 436.

No. 13.

Order Permitting Creditor to Join in Creditor's Petition.

[*Caption.*]

Be it remembered that this cause came on for hearing on this day upon the petition of the Security Bank of —— and other creditors of the said A. B. & Co., the exhibits to said petition and the proof, etc., when H. W., a citizen of ——, appeared by his counsel, and represented to the court that he is a creditor of said A. B. & Co. (his debt being evidenced by the promissory note of said firm of date February 20th, 1897, and due December 20th, 1897, and for the sum of $—— with interest at six per cent. per annum from date), and asked that he be allowed to join in the petition filed herein for involuntary bankruptcy, and the court doth hereby order that the said H. W. be and he is hereby allowed to become a party of this proceeding and that his name be inserted in the original petition as one of the petitioning creditors. Done this —— day of ——, A. D. ——.

No. 14.

Special Warrant to Marshal (1).

(Official Form No. 8.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

To the Marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —— day of ——, A. D. 19—, filed against ——, of the county of —— and state of ——, in said district and said petition is still pending; and whereas it satisfactorily appears that said —— has committed an act of bankruptcy [*or,* has neglected, *or,* is neglecting, *or,* is about to so neglect his property that it has thereby deteriorated, *or,* is thereby deteriorating, *or,* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ——, and of all his deeds, books of account and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the honorable ——, judge of the said court and the seal thereof, at ——, in said district, on the —— of ——, A. D. 19—.

———,
Clerk.

[*Seal of the court.*]

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ——, and of all his deeds, books of account and papers which have come to my knowledge.

———,
Marshal [*or,* Deputy Marshal.]

FEES AND EXPENSES.

1. Service of warrant.....		
2. Necessary travel, at the rate of six cents a mile each way		
3. Actual expenses in custody of property and other services as follows.....		
[*Here state the particulars.*]		

——,

Marshal [*or,* Deputy Marshal].

District of ——, A. D. 19—.

Personally appeared before me the said ——, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 69 and sec. 3*e*. Loveland's Bank., sec. 79.

An application to seize property should not be joined in petition for an adjudication. *In re* Kelly, 91 Fed. Rep. 504; Mather *vs.* Coe, 92 Fed. Rep. 333.

No. 15.

Bond of Petitioning Creditor (1).

(Official Form No. 9.)

Know all men by these presents: That we, ——, as principal, and ——, as sureties, are held and firmly bound unto ——, in the full and just sum of —— dollars, to be paid to the said ——, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our

heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this —— day of —— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said —— has applied to that court for a warrant to the marshal of said district, directing him to seize and hold the property of said —— subject to the further orders of said District Court.

Now therefore if such a warrant shall issue for the seizure of said property and if the said —— shall indemnify the said —— for such damages as he shall sustain in the event such seizure shall prove to have beeen wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of —— [*Seal.*]

—— —— [*Seal.*]

—— —— [*Seal.*]

Approved this —— day of ——, A. D. 190—.

——,

District Judge.

(1) B. A. 1898, sec. 3*e*. Loveland's Bank., sec. 79.

No. 16.

Bond to Marshal (1).

(Official Form No. 10.)

Know all men by these presents: That we, ——, as principal, and ——, as sureties, are held and firmly bound unto ——, marshal of the United States for the —— District of ——, in the full and just sum of —— dollars, to be paid to the said ——, his executors, administrators or assigns, to

which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 190—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the District Court of the United States for the —— District of ——, against the said ——, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said ——, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said District Court, upon a petition of said ——, has ordered the said property to be released to him.

Now, therefore, if the said property shall be releasd accordingly to the said ——, and the said ——, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of —— [*Seal.*]
—— —— [*Seal.*]
—— —— [*Seal.*]

Approved this —— day of ——, A. D. 19—.

——,
District Judge.

(1) B. A. 1898, sec. 69.

No. 17.

Petition to Enjoin Bankrupt or His Agent from Disposing of Property of the Estate.

In the District Court of the United States for the —— District of ——.

In the matter of E. B., bankrupt. In bankruptcy.

Respectfully represents E. M., trustee of the bankrupt herein, that as shown by the testimony in this case the said bankrupt

pretends that the $——, being the proceeds of the sale of the stock of goods and the mortgage upon the real estate on Third Street, in ——, is in the possession of his son, F. B.; that as shown by the record in this cause an order was entered requiring the said F. B. to appear before the referee herein and testify concerning the estate herein, and that said order has been returned "not found," and that a second order to such effect for his appearance has been entered and the same is now in the hands of the officers for execution. He says that the said F. B. so conceals his whereabouts that it is impossible for this petitioner, and, as he is informed, for the marshal of this court having said second order for execution, to learn of his said whereabouts; that petitioner is informed that there are persons offering to divulge the whereabouts of the said F. B. so that said order can be executed, upon the payment of the sum of $50.00.

He further reports that as shown by the evidence herein the said F. B. was authorized by the bankrupt herein to receive the said fund of $——, and that while said bankrupt pretends that he requested the payment of said money by said F. B. to said bankrupt he has made no effort to get said money and put it into the hands of this petitioner either as receiver of this court or as trustee, and that, notwithstanding that said bankrupt further pretends that he and his son were proposing to use said money to settle with the creditors and start another business elsewhere; and petitioner further reports that notwithstanding the said F. B. was present in —— up to the time of the proceeding in bankruptcy herein, he immediately thereon or immediately thereafter concealed his whereabouts from this petitioner and has kept them so concealed since that time.

Petitioner further refers to the record herein as to the order entered herein on the —— day of ——, A. D. ——, directing the said E. B. to pay said sum of money to this petitioner on or before the —— day of ——, and though petitioner says that he does not know whether said money is in the hands of said E. B. or under his control or in the hands of the said F. B.,

or under his control, he is fearful that said fund will be dissipated, and that said order may not be wholly effectual unless an injunction or restraining order be entered herein enjoining or restraining the said F. B. from disposing of any part of said funds and further ordering him to pay said fund into the hands of this petitioner. Petitioner says that from the evidence in this case already taken it appears, and petitioner believes, that the said sum of $—— is a part of the estate and property of the bankrupt herein; that the same did not come into the hands of the said F. B., if at all, as a common or simple debtor, and that he does not occupy that relation to this estate, but that said sum is a fund belonging to this estate and should be in the hands of this petitioner.

The premises considered, he prays for instruction as to the said matter as herein set up concerning the payment of the said sum of $50.00 as an aid to ascertain the whereabouts of the said F. B.; he prays for an order enjoining and restraining the said F. B. from disposing of the said money or any part thereof and further ordering and directing him to pay all, or so much thereof as he may have in his hands into the hands of this petitioner.

X. & X.,
Attorneys for Trustee.

E. M. says that he is trustee of the estate of the bankrupt herein, and that the statements contained in the foregoing petition are true, as he believes. E. M.

Subscribed and sworn to before me by E. M., this —— day of ——, A. D. ——. W. W., Notary Public,
Within and for County of ——
State of ——.

(1) Taken from the record in Mueller *vs.* Nugent, 184 U. S. 1.

No. 18.

Motion for Injunction.

In the District Court of the United States,

For the —— District of ——

In the matter of A. B., Bankrupt No. —— in bankruptcy.

At ——, in said District, on the —— day of —— A. D. 190—, —— District of ——, ss.

R. X. Esq., attorney for petitioning creditors [*or as may be*] moves the court for a writ of injunction against E. F., G. H. and J .K. according to the prayer of petition filed by R. S., E. T. and G. W. in this matter. R. X.

Attorney for [*as may be.*]

No. 19.

Temporary Restraining Order.

[*Caption.*]

And now, this —— day of —— 190—, on motion of said attorney, it appearing to the court that notice of this motion has been duly given to the proper parties, viz., E. F., G. H. and J. K. and that there is danger of irreparable injury to the creditors of the said debtor, unless the act sought to be enjoined is at once restrained, it is ordered that the above motion be heard at a session of said court, to be held at ——, on the —— day of —— A. D. 190—, at 10 a. m.; and it is further ordered that, until the decision of this court upon the said motion, the said parties against whom an injunction is prayed be restrained, and they are hereby commanded, under such penalties as are inflicted by the laws of the United States, to abstain from any and all interference, by execution, levy, sale, or in any other manner whatever, with the property or estate of the above named debtor.

(1) B. A. 1898, sec. 2, clause 15; sec. 718, R. S.

No. 20.

Petition to Stay Pending Suit.[1]

In the District Court of the United States
For the —— District of ——.

In re A B., }
Bankrupt }

Your petitioner, A M, respectfully shows that A B was duly adjudicated a bankrupt herein on the —— day of —— 19— upon a petition filed the —— day of ——, 19—, and your petitioner A M was on the —— day of —— appointed and duly qualified as trustee of the estate of the said A B in bankruptcy, and is now acting as the said trustee.

That among the debts scheduled by said bankrupt proceedings is one for ——— dollars ($———), due C D and that such debt is of such a nature as to be released by a discharge in bankruptcy.

That at the time of the filing of the petition, on which said adjudication was made a suit was pending in the —— court of —— entitled C D vs. A B, founded upon the debt aforesaid from which a discharge in bankruptcy would be a release, and that the suit is still pending therein, and that if such suit is not stayed, great injury will be done your petitioner and the estate of A B to be administered in bankruptcy herein.

Wherefore your petitioner prays that further proceedings in said suit may be stayed pursuant to the bankruptcy laws of the United States in such cases made and provided, and that an injunction may be issued out of this Honorable Court directed to the said C D, restraining him, his agents, servants, attorneys and counselors from further prosecuting said suit in said court and for such other and further relief as to the court may seem just.

A. M.,
Trustee Petitioner.

State of——— }
County of——— } ss.

I, A M, the petitioner mentioned in the foregoing petition, do hereby make solemn oath that the statements of fact contained therein are true to the best of my knowledge, information and belief.

A. M.

Subscribed and sworn to before me this —— day of —— 19—.

J. N.
Notary Public in and for said County and State.

[1] This petition may be used with slight changes for stay prior to an adjudication. The bankrupt or the petitioning creditors may apply for a stay if no trustee has been appointed.
See also Loveland's Bank., sec. 22.

No. 21.

Injunction to Stay Suit. (1)

The United States of America, ——— District of ——— ——— Division } ss.

The President of the United States of America, to R. S. and S. T., greeting:

Whereas, a petition has been filed on the bankruptcy side of the District Court of the United States for ——— Division of the ———District of ———, praying for an injunction to restrain the prosecution of a certain suit pending in the ——— court in the county of ——— state of ——— in which you are plaintiffs and A. B. bankrupt is defendant, and has obtained an allowance for an injunction, as prayed for in said petition, from the District Court of the United States for the ———District of ———.

Now, therefore, we, having regard to the matters in said petition contained, do hereby command and strictly enjoin you, the said R. S. and S. T., or either of you, and each of your agents, servants, attorneys or counsellors, from further prosecuting said suit in said court, and from taking any further steps or proceeding in said action or suit now pending, as aforesaid, which commands and injunction you are respectively required to observe and obey until twelve months after the ——— day of ———, the date the said A. B. was adjudged a bankrupt, or if within that time the said A. B. applies for a discharge, then until the question of such discharge is determined, or until our said District Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

Witness, the Honorable G. R., District Judge of the United States for the ——— District of ———, this ——— day of ——— A. D., 19—. and in the ——— year of the independence of the United States of America.

B. R.,
Clerk of said Court.

[Seal.]

(1) See Loveland's Bank., sec. 22.

No. 22.

Order Denying Preliminary Injunction Against Execution Creditors.

[*Caption.*]

Ordered that the application of the trustee for a preliminary injunction against the E. F. Company and C. & D., restraining them from proceeding with their executions against the bankrupt's wife, be denied and the petition filed ——, in that behalf be dismissed, also that the sheriff be directed to pay the money in his hands to the plaintiffs in the executions, as if the proceedings here had not been taken. But this order is without prejudice to the trustee to proceed at law or in equity in any court of competent jurisdiction to recover the money from the execution creditors aforesaid, as he may be advised.

The complainant herein will pay the costs of this cause, for which execution is hereby awarded against him, and K. D., surety on his cost bond herein.

No. 23.

Petition for the Appointment of a Receiver.

[*Caption.*]

Respectfully show, American Cutlery Co., A. M., engaged in business under the name and style of W. & Co. H. L., and R. Foundry Co., that heretofore, to wit, on the —— day of ——, ——, your petitioners filed an involuntary petition in bankruptcy against the A. B. Co., to which petition reference is here made for the specific allegations thereof. That the estate of said The A. B. Co., consisting of goods, wares and merchandise, accounts, etc., have been set over, transferred and delivered to the assignee, C. W., with general authority to sell and dispose of the same, and that furthermore certain creditors of

said company are seeking the appointment of a receiver to take charge of said property, under the orders of the Chancery Court of —— County, ——; that said property is in danger of being disposed of in some way not to the best advantage of your petitioners, and that large costs are being incurred, which are unnecessary and improper, and that therefore there may be considerable loss to the estate.

Wherefore, your petitioners pray that a temporary receiver to take charge of said estate, until a trustee can be elected, be at once appointed by your honor, and be empowered to take charge of and impound all of the property of said The A. B. Co. and hold the same subject to the further orders of this court.

American Cutlery Co.,
W. & Co.,
H. L.,
R. Fdy. Co.,
By R. X.,
Their Attorney.

No. 24.

Order Refusing to Appoint a Receiver.

[*Caption.*]

And on the —— day of ——, came the parties, by their attorneys. The court being now fully advised of the petitioners' motion for the appointment of a receiver herein, it is therefore considered by the court that the said motion be, and the same is hereby, overruled.

No. 25.

Order Appointing a Receiver in Bankruptcy (1).

The District Court of the United States, —— District of ——. } In bankruptcy.

In the matter of the petition of A. B. & Company and others to have The F. Company declared bankrupt.

This cause coming on to be heard upon the petition of A. B. & Company a creditor, to have a receiver appointed for said alleged bankrupt The F. Company, and due notice having been served of this application, and it appearing to the court that it is absolutely necessary for the preservation of the estate of said alleged bankrupt that a receiver be forthwith appointed, to take charge of, hold, manage and conduct the estate, property and assets of said alleged bankrupt;

It is therefore ordered, adjudged and decreed that W. R. be and he is hereby appointed receiver of all the assets and property of every kind and character of and belonging to the said F. Company, and said receiver is hereby clothed with all the power and authority of receivers in bankruptcy in like cases.

It is further ordered that said receiver within three days from this date, file a bond as such receiver, in the usual form, in the penal sum of $—— with surety to be approved by the clerk of this court.

It is further ordered that said receiver continue and conduct the business of said alleged bankrupt until the further order of this court, and said receiver is hereby authorized and directed to employ any and all necessary help, including counsel, in the administration of his trust, therefore personally came the said W. R. and qualified as such receiver.

(1) The authority for the appointment of receivers in bankruptcy is purely statutory. For the powers of a receiver, see Booneville Nat. Bank *vs.* Blakey, 107 Fed. Rep. 891, 6 Am. B. R. 13. He may be authorized to conduct the bankrupt's business for a limited period. Bank-

ruptcy Act 1898, sec. 21, clause 5. A receiver should be appointed by the judge, but in his absence the referee may make the appointment. *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *in re* Florcken, 107 Fed. Rep. 241.

Sec. 2, clause 5, of the Bankruptcy Act was amended by the Act of February 5, 1903, to read as follows:

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

No. 26.

Order to Put Receiver in Possession.

[*Caption.*]

It appearing to the referee from the petition of J. M., receiver, filed herein on the —— day of ——, that he, the said J. M., as receiver, acting under an order of this referee, acting in the absence of the judge of this court from the —— Division of the —— District of ——, lawfully proceeded to take charge of all of the properties of the defendant, A. B. Co., in the possession of C. W., assignee, under authority and power contained in said order of appointment, and it further appearing to the referee that the said C. W. has refused to surrender the possession thereof to the said J. M., receiver, who is an officer of this court under appointment of date ——, and that the said C. W. has openly, defiantly and in disobedience of an order of this court refused to set over and surrender to the said J. M. the moneys and other properties belonging to the defendant company and in his possession, and unlawfully withholds the same from the said receiver, it is, therefore, ordered that the marshal of the United States for the —— Division of the —— District of ——, proceed at once to take charge of and seize all of the properties of the defendant, The A. B. Co., of whatsoever kind and description in the possession of C. W., assignee, or his agents, or the agents or employes of the said A.

B. Company, and put the said J. M., receiver, in lawful and peaceable possession thereof, and the said marshal will carry into effect this order and report his action to this referee. This —— day of ——.

R. D.
Referee in Bankruptcy.

No. 27.

Marshal's Return on Above Order.

United States of America,
—— District of ——, ss.

Came to hand this the —— day of ——, and executed as therein commanded, by making known the contents of said writ, and receiving from the said C. W., assignee, the front door keys of the four story brick building, No. 401 Main St., and all contents therein of this date. Also front door keys to the four story brick building, No. 257 Main St., and all contents of said building of this date, and all keys and combinations to one large iron safe in building No. 401 Main St., ——. Also three checks amounting to sixteen and 40-100 dollars and cash $9.06 (nine and 06-100) for which I gave the said C. W. a receipt, and for which a receipt was taken from the said J. M., receiver. Formal demand was also made upon the said C. W., assignee, for any and all cash belonging to the said A. B. Co. in his possession as assignee in any of the banks of ——, which demand was refused by the said C. W.

V. F.
United States Marshal.

No. 28.

Adjudication that Debtor is not Bankrupt (1).

(Official Form No. 11.)

In the District Court of the United States
For the —— District of ——.

In the matter of
—— —— ——
—— —— ——
—— —— ——
} In Bankruptcy.

At ——, in said district, on —— day of ——, A. D. 19—, before the honorable ——, judge of the —— District of ——.

This cause came on to be heard at ——, in said court, upon the petition of —— that —— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— was not a bankrupt, and that said petition be dismissed with costs.

Witness the honorable ——, judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. Loveland's Bank., sec. 88.

An order of adjudication should not be made until the expiration of the time for creditors to intervene and oppose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service. *In re* Humbert Co., 100 Fed. Rep. 439; *in re* Columbia Real Estate Co., 101 Fed. Rep. 965. Day *vs.* Beck & Gregg Hardware Co., 8 Am. B. R. 175.

No. 29.

Adjudication of Bankruptcy (1).

(Official Form No. 12.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
—— —— ——
Bankrupt } In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before the honorable ——, judge of said court in bankruptcy, the petition of —— that —— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said —— is hereby declared and adjudged bankrupt accordingly.

Witness the honorable ——, judge of said court, and the seal thereof, at —— in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. Loveland's Bank., sec. 88.

An order of adjudication should not be made until the expiration of the time for creditors to intervene and oppose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service. *In re* Humbert Co., 100 Fed. Rep. 439; *in re* Columbia Real Estate Co., 101 Fed. Rep. 965. Day *vs.* Beck & and Gregg Hardware Co., 8 Am. B. R. 175.

A secured or general creditor or a person who is not interested in an adjudication will not be entitled to make a motion to set it aside. *In re* Columbia Real Estate Co., 101 Fed. Rep. 965.

No. 30.

Order of Adjudication and Designating Newspaper.[1]

In the District Court of the United States
—— District of ——

In the matter of A. B., bankrupt. } In Bankruptcy.
No. ——

At ——, in said district, on the —— day of ——, 190—, before the said Court in Bankruptcy, the petition of A. B. that he be adjudged bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said A. B. is hereby declared and adjudged bankrupt accordingly.

It is further ordered that all notices required to be published in the above entitled matter, and all orders which the court may direct to be published, be inserted in —— a newspaper published in the —— County of ——, State of ——, within the territorial district of this court, and in the County within which said bankrupt resides.

Dated, ——

——
District Judge.

(1) The above form is used in some districts. In others a general designation of newspapers for each county is made which by its terms is applicable to all subsequent cases.

No. 31.

Order of Reference (1).

(Official Form No. 14.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of
——— ——— ——— } In Bankruptcy.
Bankrupt.
——— ——— ———

Whereas, ——, of ——, in the county of ——, and district aforesaid, on the —— day of ——, A. D. 19.., was duly adjudged a bankrupt upon a petition filed in this court by [*or,* against] him on the —— day of ——, A. D. 19—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to ——, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of —— at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said —— bankruptcy.

Witness the honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 190—.

——,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*d* and *e*. *In re* Bellamy, No. 1268, Fed. Cas., s. c. 1 Ben. 474; Gen. Ord. 12. Loveland's Bank sec. 90.

No. 32.

Order of Reference in Judge's Absence (1).

(Official Form No. 15.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of } In Bankruptcy.
——— ——— ———
——— ——— ———

Whereas, on the —— day of ——, A. D. 19—, a petition was filed to have ——, of ——, in the county of ——, and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas, the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy,* on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said mater be referred to ——, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— shall attend before said referee on the —— day of ——, A. D. 19—, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the —— day of ——, A. D. 19—.

———,
Clerk.

[*Seal of the court.*]

(1) B. A. 1898, sec. 18*f* and *g*; Gen. Ord. 12.

No. 33.

Referee's Oath of Office.

(Official Form No. 16.)

I, ——, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 190—.

——,
District Judge.

(1) B. A. 1898, sec. 36.

No. 34.

Bond of Referee (1).

(Official Form No. 17.)

Know all men by these presents: That we, ——, of ——, as principal, and ——, of ——, and ——, of ——, as sureties, are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of ——, A. D. 19—.

The condition of this obligation is such that whereas the said —— has been, on the —— day of ——, A. D. 19—, appointed by the honorable ——, judge of the District Court of the

United States for the —— District of ——, a referee in bankruptcy in and for the county of ——, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said —— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of —— [*Seal.*]
—— [*Seal.*]
—— [*Seal.*]

Approved this —— day of ——, A. D. 19—.

——,
District Judge.

(1) B. A. 1898, sec. 50.

No. 34a.

Petition by Trustee to Recover a Preference.

(Style of Court.)

H. W., Trustee of the Estate of A. B., Bankrupt, Plaintiff,
vs.
The C. D. Co., Defendant.

Plaintiff states that on the —— day of ——, 19—, a petition in bankruptcy was filed against A. B., in the District Court of the United States for the —— Division of the —— District of ——, and that thereafter the said A. B. was duly adjudicated bankrupt, and that thereafter plaintiff was duly elected trustee of the estate of said bankrupt, and has duly qualified as such. That the defendant is and was at the time hereinafter mentioned, a corporation duly organized and existing under the laws of the —— State of ——.

For its cause of action plaintiff states, that within four months prior to the said petition in bankruptcy being filed,

namely, on or about the —— day of ——, 19—, the said A. B. was insolvent and was indebted to this defendant in the sum of $——, and in payment of said indebtedness transferred to this defendant merchandise consisting of - ——— of the reasonable value of $——. That the effect of the transfer of said property was that this defendant obtained a greater percentage of its debt than any other creditor of said bankrupt of the same class. That defendant and its agents had reasonable grounds to believe at said time that it was intended by such transfer of property to give a preference to this defendant, within the meaning of the Acts of Congress relating to bankruptcy. That after this plaintiff had been elected trustee and had qualified, he notified said defendant that he avoided said transfer of property as a preference and he demanded of said defendant the return of said property, but that defendant refused and still refuses to return the same.[2]

Wherefore plaintiff prays judgment in the sum of $—— and his costs.

H. W.,
Trustee in Bankruptcy.

[*Verification.*]

(1) Taken from Pace v. Roberts et al Shoe Co., 103 Mo. App., 662, 665. If the petition is filed in a circuit court of the United States it should aver the amount in controversy and the citizenship of the bankrupt and the defendant. Bush v. Elliott, 202 U. S., 477.

(2) No previous demand is necessary. Kaufman v. Treadway, 195 U. S., 271.

No. 34b.

Intervening Petition of Vendee under Conditional Sale.[1]

In the District Court of the United States, —— District of ——.

In the Matter of the A. B. Company. } In Bankruptcy. No. ——

Now comes the Y. Manufacturing Company, a corporation duly organized under the laws of the state of ——, and a citizen of ——, of such state, and leave having been first obtained to intervene in this cause, presents this its petition to this Honorable Court and says:

That your petitioner made a contract of sale with The A. B. Company, a corporation organized and existing under the laws of the State of ——, or about September 30th, 19—, countersigned October 27th, 19—, by your petitioner. That a copy of this coutract marked Exhibit "A" is hereto attached and made a part hereof. That by the terms of this contract your petitioner was to erect upon the premises indicated by The A. B. Company a certain ice-making and refrigerating plant fully described in the contract annexed. That the price to be paid therefor was —— dollars, and that the title to, and right of property in, and ownership of said plant and machinery so furnished was to remain in your petitioner until the same was fully paid for in cash. That said plant and machinery was erected by your petitioner as agreed. That only twenty-five per cent. of the purchase price has ever been paid. That the remaining seventy-five per cent. of said contract price is due and unpaid, notwithstanding demand having been made therefor. That by reason of such defaults the right has accrued to your petitioner under said contract to enter upon the premises of The A. B. Company and remove and repossess itself of said plant and machinery.

That on or about the 11th day of December, 19—, this honorable court adjudged The A. B. Company a bankrupt, whereupon the said plant and machinery passed into the possession and control of this honorable court.

Wherefore your petitioner prays this honorable court for an order directing such officer of this honorable court as shall at the time of making such order be in possession thereof, to permit your petitioner to enter on the premises of said bankrupt and to afford your petitioner every facility to remove said bankrupt and machinery.

And your petitioner prays for all other and further relief to which it may be entitled.

THE Y. MANUFACTURING COMPANY.,
By S. Y., Pres.

[*Verification.*]

(1) This form is taken from the record in York Mfg. Co. v. Cassell, 201 U. S., 344, 50 L. Ed., 782, 15 Am. B. R., 639.
For another form see In re Hemstreet, 8 Am. B. R., 763.

PROCEEDINGS BEFORE REFEREE.

No. 35.

Notice of First Meeting of Creditors (1).

(Official Form No. 18.)

In the District Court of the United States
For the —— District of ——. In Bankruptcy.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

To the creditors of ——, of ——, in the county of —— and district aforesaid, a bankrupt:

Notice is hereby given that on the —— day of ——, A. D. 18—, the said —— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at ——, in ——, on the —— day of ——, A. D. 19—, at —— o'clock in the ——noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting.

——,
Referee in Bankruptcy.

——, 19—.

(1) B. A. 1898, secs. 55 and 58*b* and *c;* Gen. Ord. 12.
How to conduct the first meeting of creditors see *in re* Eagles, 99 Fed Rep. 695, 3 Am. B. R. 733.

No. 36.

Affidavit in Proof of Publication of Notice of the First Creditors' Meeting.

The District Court of the United States
—— District of —— Division—In bankruptcy.
State of ——,
County of ——, ss.

Personally appeared before me, a notary public, in and for said County, E. S., for the publisher of The Court Index, who, being duly sworn, says that the annexed advertisement was published —— times, on the ——, 190—, and that said publication was made in The Court Index, a newspaper printed and of general circulation in said county, and the paper duly designated by the District Court of the United States for —— District of ——, —— Division, sitting as a Court of Bankruptcy, for the publication of all notices required to be published within the District of —— County, under the act of Congress, approved July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States."

E. S.

Sworn to before me, and signed in my presence, this —— day of ——, 190—.

J. N.
Notary Public, within and for
—— County, ——.
——, 190—.

I hereby certify that this day I mailed a copy of the notice above set forth to each of the creditors named in the schedules filed herein.

A. M.,
Referee in Bankruptcy.

No. 37.

Appointment, Oath, and Report of Appraisers (1).

(Official Form No. 13.)

In the District Court of the United States
For the ——District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

It is ordered that ——, of ——, —— of ——, and ——, of ——, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

—— District of ——, ss.

Personally appeared the within-named —— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

——,
——,
——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a

strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at ——, this —— day of ——, A. D. 19—.

——,

——,

——

(1) B. A. 1898, sec. 70*b*.

No. 38.

List of Debts Proved at First Meeting.

(Official Form No. 19.)

In the District Court of the United States
For the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

——,
Referee in Bankruptcy.

No. 39.

General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law (1).

(Official Form No. 20.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

To ——,
——:

I, ——, of ——, in the county of —— and state of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and

there from time to time, and as often as there may be occasion, for me and my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the —— day of ——, A. D. 19—.

—— [*Seal.*]

Signed, sealed and delivered in presence of

——.

Acknowledged before me this —— day of ——, A. D. 19—.

——,

[*Official character.*]

(1) When executed on behalf of a partnership or of a corporation the person executing the instrument must make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. Gen. Ord. 21, par. 5.

An attorney at law cannot vote at a creditors' meeting without producing a letter of attorney, duly appointing him an attorney in fact. *In re* Sugenheimer, 91 Fed. Rep. 744; *in re* Blankfein, 97 Fed. Rep. 191,

No. 40.

Special Letter of Attorney in Fact.

(Official Form No. 21.)

In the matter of ——— ——— ———, Bankrupt.	In Bankruptcy.

To ———,

———:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ———, on the ——— day of ———, before ———, or any adjournment thereof, and then and there ——— for ——— and in ——— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

In witness whereof I have hereunto signed my name and affixed my seal the ——— day of ———, A. D. 19—.

——— [*Seal.*]

Signed, sealed and delivered in presence of

———.

Acknowledged before me this ——— day of ———, A. D. 19—.

———,

[*Official character.*]

See note to Form No. 39.

No. 41.

Appointment of Trustee by Creditors. (1).

(Official Form No. 22.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint ——, of ——, in the county of —— and state of ——, to be the trustee —— of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be and the same is hereby approved

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 44 and sec. 50*c*. No official or general trustee can be appointed by the court. Gen. Ord. 14.

A trustee is elected by the majority of the creditors present at the

meeting and not of those who have proved claims against the estate. *In re* Henschel, 113 Fed. Rep. 443, 7 Am. B. R. 662.

If the creditors fail to appoint, the referee may do so, but if the referee refuses to confirm the trustee elected by creditors, he cannot appoint but should call another meeting for the purpose of a new election. *In re* Lewensohn, 3 Am. B. R. 299, 98 Fed. Rep. 576; *in re* Mackellar, 116 Fed. Rep. 547.

No. 42.

Appointment of Trustee by Referee. (1).

(Official Form No. 23.)

In the District Court of the United States
For the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint ——, of ——, in the county of —— and state of ——, as trustee of the same.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 44. No general or official trustee can be appointed to act in cases generally. Gen. Ord. 14.

A referee cannot appoint a trustee simply because he declines to approve one elected by the creditors. He must call another meeting for an election. *In re* Lewensohn, 3 Am. B. R. 299, 98 Fed. Rep. 576; *in re* Mackellar, 116 Fed. Rep. 547.

No. 43.

Notice to Trustee of His Appointment (1).

(Official Form No. 24.)

In the District Court of the United States
For the —— District of ——.

In the matter of —— Bankrupt. ——	In Bankruptcy.

To ——, of ——, in the county of ——, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or*, one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the —— day of —— A. D. 19—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at ——, the —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) Gen. Ord. 16. The creditors fix the amount of the bond. B. A. 1898, sec. 50*c*.

No. 44.

Bond of Trustee. (1).

(Official Form No. 25.)

Know all men by these presents: That we, —— ——, of ——, as principal, and —— ——, of ——, and —— ——, of ——, as sureties, are held and firmly bound unto the United States of America in the sum of —— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this —— day of ——, A. D. 190—.

The condition of this obligation is such, that whereas the above-named —— —— was, on the —— day of ——, A. D. 190—, appointed trustee in the case pending in bankruptcy in said court, wherein —— —— is the bankrupt, and he, the said —— ——, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said —— ——, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in
presence of

—— —— —— —— [*Seal.*]
—— —— —— —— [*Seal.*]
—— —— [*Seal.*]

(1) B. A. 1898, secs. 50*b* and *c*.

No. 45.

Order Approving Trustee's Bond.

(Official Form No. 26.)

At a court of bankruptcy, held in and for the —— District of ——, at ——, ——, this —— day of ——, 190.—.

Before —— ——, referee in bankruptcy, in the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

It appearing to the court —— ——, of ——, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for faithful performance of his official duties, in the amount fixed by the creditors [*or,* by order of the court], to wit, in the sum of —— dollars, it is ordered that the said bond be and the same is hereby approved.

——,
Referee in Bankruptcy.

No. 1156.

Order that no Trustee be Appointed. (1).

(Official Form No. 27.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no

assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

——,

Referee in Bankruptcy.

(1) Gen. Ord. 15.

No. 47.

Order for Examination of Bankrupt. (1).

(Official Form No. 28.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

Upon the application of ——, trustee of said bankrupt [*or*, creditor of said bankrupt], it is ordered that said bankrupt attend before ——, one of the referees in bankruptcy of this court, at ——, on the —— day of ——, at — o'clock in the ——noon, to submit to examination under the Acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 7, clause 9; sec. 21, and sec. 38, clause 2. Gen. Ord. 22. See also note to No. 48.

No. 48.

Examination of Bankrupt or Witness. (1).

(Official Form No. 29.)

In the District Court of the United States for the —— District of ——.

In the matter of —— Bankrupt. ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—, before ——, one of the referees in bankruptcy of said court.

——, of ——, in the county of ——, and state of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says [*here insert substance of examination of party*].

——,
Referee in Bankruptcy.

(1) Loveland's Bank., sec. 204, B. A. 1898, sec. 21. Gen. Ord. 22.

Sec. 21*a* of the Bankruptcy Act is amended by act of Feb. 5, 1903, to read: "*a.* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act; provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

A large latitude of inquiry is allowed in the examination of the bankrupt and other persons closely connected with him in his business dealings for the purpose of discovering the assets and unearthing frauds and upon any reasonable surmise that they have the assets of the debtor. *In re* Horgan (C. C. A., 2nd Cir.), 98 Fed. Rep. 414, 3 Am. B. R. 253; *in re* Bard, 108 Fed. Rep. 208; *in re* Foerst, 93 Fed. Rep. 190, 1 Am. B. R. 259; *in re* Carley, 106 Fed. Rep. 862, 5 Am. B. R. 554; Peoples' Bank *vs.* Brown (C. C. A. 3rd Cir.) 112 Fed. Rep. 652; 7 Am. B. R.

475; *in re* Cliffe, 97 Fed. Rep. 540, 3 Am. B. R. 257. A trustee in insolvency under a state law may be examined. *In re* Pursell, 114 Fed. Rep. 371, 8 Am. B. R. 96.

It is not necessary that there be a formal application for an examination showing the particular questions proposed to be asked or the particular facts as to which the examination is to be made. *In re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

Testimony taken upon the examination of the bankrupt is taken in the whole pending proceeding and may be introduced and read upon the hearing of a petition for a discharge. *In re* Wilcox (C. C. A., 2nd Cir.), 109 Fed. Rep. 628, 6 Am. B. R. 362; *in re* Cooke, 109 Fed. Rep. 631, 5 Am. B. R. 434; *in re* Bard, 108 Fed. Rep. 208. But where a claimant was not in fact a party and could not exercise the right of cross examination at the time the witnesses were examined, the witnesses, including the bankrupt, must be recalled unless the party consents to the use of the testimony as it appears in the proceedings. *In re* Kellar, 6 Am. B. R. 334.

It has been held that a bankrupt or other witness is not entitled as a matter of right to be attended and cross-examined by his own attorney. *In re* Cobb, 7 Am. B. R. 104; *in re* Howard, 95 Fed. Rep. 415, 2 Am. B. R. 582.

No. 49.

Summons to Witness (1).

(Official Form No. 30.)

To ——:

Whereas, ——, of ——, in the county of ——, and state of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the —— district of ——.

These are to require you, to whom this summons is directed, personally to be and appear before ——, one of the referees in bankruptcy of the said court, at ——, on the —— day of at —— o'clock in the ——noon, then and there to be examined in relation to said bankruptcy.

Witness the Hon. ——, judge of said court, and the seal thereof at ——, this —— day of ——, A. D. 19—.

——,

Clerk.

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

On this —— day of ——, A. D. 19—, before me came ——, of ——, in the county of ——, and state of ——, and makes oath, and says that he did, on ——, the —— day of ——, A. D. 19—, personally serve ——, of ——, in the county of ——, and state of ——, with a true copy of the summons hereto annexed, by delivering the same to him; and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——.

(1) Gen. Ord. 3. R. S. sec. 911, *et seq.*

No. 50.

Minutes of Creditors' Meeting (1).

The District Court of the United States
For the —— District of ——
In the matter of N. W., bankrupt.

Before A. M., referee, on the —— day of ——, 19—, at — o'clock. Present: The referee, bankrupt and various attorneys for creditors, and also creditors.

The motion of the B. Mfg. Co., filed on the —— day of ——

19—, coming on for hearing, I heard evidence in relation to the same, and ordered as follows, viz.:

I ordered and directed the trustee to pay over to W. K., attorney for the B. Mfg. Co., the sum of $—— being $—— less ten per cent. the amount of merchandise belonging to said company and held on consignment by the bankrupt and since sold by the receiver herein and realizing said sum; I finding the said amount to belong to the said company, I also ordered and directed the trustee to turn over to said company all the —— now on hand, or that may hereafter come to the trustee's hands, the same being the property of said company and never sold by them. I also found that the said company has a claim as per schedule, for $—— goods sold up to the —— day of ——, 19—, the same being a general claim. I also found that the said company has an additional claim for the sum of $—— goods sold from the —— day of ——, 19—, up to the date of assignment, the same being a general claim.

The attorney for the C. B. Association, mortgagee consenting, I directed the trustee to commence proceedings for the sale of real estate under mortgage in the District Court of the United States, said mortgagee agreeing to enter its appearance and consent to jurisdiction. And I directed the same proceedings to be brought in relation to the other mortgaged real estate, in the event similar consent of mortgagee can be secured.

The bill of the heirs of G. W. for rent from the —— day of ——, 19—, to the —— day of —— 19—, amounting to $—— being presented as a claim entitled to preference on the ground of expense incurred by the assignee and trustee, and it appearing that possession was not taken until the —— day of ——, 19—, I accordingly reduced said claim to $——, which sum I directed the trustee to pay as a preferred claim.

The matter of disposition of the assigned bankrupt's stock of merchandise, etc., being heard, on motion of the creditors the trustee herein was directed to sell the same at private sale at not less than —— per cent. of the appraised value, and was

also authorized to employ a man to assist in said work at not exceeding $—— a week.

The bankrupt stated that his wife withdraws all claims herein, and that she would not file any claim herein.

The application of F. Q., for the payment of the proceeds of —— bales out of —— bales of ——, sent to the bankrupt on consignment, was heard, and it appearing that said goods were on consignment and that —— bales have been sold by the trustee herein as receiver herein, for the sum of $——, it is ordered that said sum less —— per cent. the usual commission, to wit the sum of $—— be paid to said F. Q. as a preferred claim herein.

It also appearing that the trustee herein has in his possession —— bales of spoiled —— sent by F. Q. to the bankrupt on consignment, and which property was not appraised herein or included in the appraisement, I ordered that the trustee deliver said property to the said F. Q.

The application of the appraisers for $—— compensation each, was rejected by me as excessive charges, and on motion of the creditors and with their consent, I directed the trustee to pay to each of the appraisers herein the sum of $——.

In relation to the disposition of the bank stock and the B. Brewing Co. bonds, the trustee was directed to get offers for the purchase of the same, and report to the referee.

In relation to policy No. —— N. Y. L. Insurance Company, the trustee was directed to inquire into its value of the company, and report to the referee.

The trustee was ordered to collect from E. T., assignee, the sum of $——, collected by the said assignee.

The trustee was directed to pay all tax bills and delinquent taxes on real or personal property.

The trustee was directed to sell the real estate at ——, for not less than —— per cent. of its appraised value.

The bankrupt was examined and further examination continued until —— day of ——, 19—, at — o'clock, and the trustees authorized to employ an accountant to furnish to the court

and creditors information of payments made by the bankrupt within the past four months preceding his assignment.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 51.

Order that Bankrupt Deliver Assets to Trustee (1).

[*Caption.*]

This cause having been referred to the undersigned A. M., as referee, after an examination of said bankrupt and evidence having been fully had before said referee in accordance with the statutes in such cases made and provided, the evidence having been submitted upon argument, the undersigned referee does hereby make the following order on said A. B., bankrupt:

First. That said bankrupt A. B., within twenty days from and after the service of a copy of this order having been made, pay to B. M. Esq., trustee, the sum of $——, and deliver to said trustee, United States three per cent. coupon bonds of the face value of $——, or $—— in money.

Second. That in the event of the said A. B. failing or neglecting to obey this order to pay to the said trustee the above amount and deliver said bonds or money, the said B. M., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Section 29 of the Bankrupt Act of 1898, and

It is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X. Esq., attorney for the bankrupt, and on B. M. Esq., said trustee.

Dated at —— this —— day of ——. A. M.,
Referee.

(1) For proceedings if bankrupt fails to obey this order, see Nos. 115. *et seq.*

No. 52.

Order that Trustee Apply to be Made Party to Suit in State Court.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

On motion of the S. Trust Company, trustee herein, it is ordered that said trustee file a petition to be made a party to the suit pending in the —— Circuit Court, styled L. S., etc., against D. G., etc., and said trustee is further directed in said petition to pray the Honorable —— Circuit Court to turn over to it, the S. Trust Company, trustee in bankruptcy, the fund in said —— Circuit Court, in the cause aforesaid.

A. M.,
Referee in Bankruptcy.

No. 53.

Order of State Court to Pay Over to Trustee in Bankruptcy Fund in Court.

State of ——.

Circuit Court, Common Pleas Division.

L. C. assignee of C. D. & Co., Plaintiff,

vs.

D. G. etc., Defendants.

Motion and Order.

This day came the A. B. Trust Company, Trustee in Bankruptcy of C. D. & Co., D. G. and C. D., by R. Y., its attorney, and presented to the court its petition presented to the court June ——, and heretofore filed herein claiming the fund in court herein, together with the exhibits referred to therein and the notice therewith served on the plaintiff, L. C., assignee of C. D. & Co., and on M. A. of the firm of M. A., D. A. and J. G., attorneys for said plaintiff, and also presented a copy of said letter to said L. C., assignee, and his said attorneys, showing that the motion would be presented at this time and hour, viz.,

on the —— day of —— at 10 o'clock a. m, and answer of M. A., D. A. & J. G., attorneys thereto, and thereupon said petitioner, by R. Y., attorney, moved the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy of said bankrupts, C. D. & Co., D. G. and C. D., be made a party defendant to this action, and thereupon said trustee moved the court that said petition be taken as the answer and petition of the said A. B. Trust Company, as such trustee, claiming the fund in court herein, which is so ordered by the court, and thereupon the said A. B. Trust Company, Trustee in Bankruptcy of said C. D. & Company, D. G. and C. D., moved the court for leave to withdraw from the fund in court herein the sum of $——, and thereupon, the court being sufficiently advised, it is ordered by the court that the said petitioner, the A. B. Trust Company, Trustee in Bankruptcy, of said C. D. & Co., D. G. and C. D., be, and is, allowed to withdraw this day from the fund in court the sum of $——.

E. F.,
Judge of the —— Circuit Court,
Common Pleas Division.

No. 54.

Proof of Unsecured Debt (1).

(Official Form No. 31.)

In the District Court of the United States
For the —— District of ——.
In the matter of A. B., bankrupt.

At ——, in said district of ——, on the —— day of ——, A. D. 190—, came E. F., of ——, in the county of ——, in said district of ——, and made oath, and says that A. B., the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt

is as follows: Goods sold and delivered at the dates and for the agreed prices set forth in the statement of account hereto attached and made part hereof as Exhibit "A"; that no part of said debt has been paid [*except*——]; that there are no set-offs or counterclaims to the same [*except* ——]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

E. F.,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

J. M.,
[*Official character.*]

(1) Gen. Ord. 21. Loveland's Bank., secs. 109-141.

If the debt to be proven is an open account, maturing on a single date, the following statement should be added, to wit:

"Said debt became [*or*, will become] due on the —— day of ——, 19—, and no note has been received for such account nor any judgment rendered thereon."

If it consists of items maturing at different dates, the following addition to said form is suggested:

"The average due date of the different items of said account is the —— day of ——, 19—, and no note has been received for such account nor any judgment rendered thereon."

If proof is being made by the assignee of a claim transferred before proof, it must be supported by a deposition of the owner at the time of the commencement of the proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured [*or*, if secured, the amount and character of securities].

The consideration must be stated. *In re* Scott, 93 Fed. Rep. 418; *in re* Stevens, 107 Fed. Rep. 243.

Debts which are provable against the estate of a bankrupt are stated in sec. 63 of the Bankrupt Act of 1898. It has been held that sec. 63*b* of the Bankrupt Act does not authorize the liquidation and proof of claims except when they may be included in one of the five classes in par. *a* in that section. *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

Referee is entitled to 25c for every proof of claim filed for allowance to be paid from the estate, if any, as a part of the costs of administration. Act of February 5, 1903, Sec. 9.

The following claims have been held not to be provable against the estate of the bankrupt:

A debt not in existence at the time of the filing of the petition, although arising before the adjudication. *In re* Burka, 104 Fed. Rep. 320, 5 Am. B. R. 12.

Claims arising *ex delicto* are only provable when recovery may be had *ex contractu*. *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; Beers *vs.* Haulin, 99 Fed. Rep. 695, 3 Am. B. R. 745.

Or alimony; Audubon *vs.* Shufeldt, 181 U. S. 575.

Or a fine in a criminal case. *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. 590. But see *in re* Alderson, 98 Fed. Rep. 588, 3 Am. B. R. 544.

Or rent to accrue in the future against the estate either as a liquidated or unliquidated claim. Arnstein, 101 Fed. Rep. 706; *in re* Jefferson, 93 Fed. Rep. 948; *in re* Mahler, 105 Fed. Rep. 428; Bray *et al.* *vs.* Cobb, 100 Fed. Rep. 270; Atkins *vs.* Wilcox (C. C. A., 5th Ct.), 105 Fed. Rep. 598; *in re* Ells, 98 Fed. Rep. 968.

Or contingent claims. *In re* Rosenzweig, 118 Fed. Rep. 112; *in re* Swift (C. C. A., 1st Cir.), 112 Fed. Rep. 315, 7 Am. B. R. 374; Goding vs. Rosenthal, Sup. Ct. Mass. 61 N. E. Rep. 222.

A contract of endorsement is provable. *In re* Gerson (C. C. A., 3rd Cir.), 6 Am. B. R. 11, 107 Fed. Rep. 897.

It has been held that where a company which was furnishing its customers ice at so much per ton, payable weekly, under contracts covering a period of several years, broke such contracts and became unable to continue them in the future, the claims of the customers for damages sustained by reason of the company's inability to fulfil the executory portions of the contracts were "provable claims" in involuntary bankruptcy proceedings against the company. *In re* Stern, 116 Fed. Rep. 604.

No. 55.

Proof of Secured Debt (1).

(Official Form No. 32.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, in

said district of ——, and made oath, and says that ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt is as follows: _____; that no part of said debt has been paid [except ————]; that there are no set-offs or counterclaims to the same [except ————————]; and that the only securities held by this deponent for said debt are the following: _____

_____

_____

——,

Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. ——.

——,

[*Official character.*]

(1) See note to Form No. 54.

Where a creditor in proving his debt fails to mention his security he will, as a general rule be deemed to elect to prove as an unsecured creditor, and to have surrendered his security. The courts, however, have permitted such a creditor to amend to change it from unsecured to secured. *In re* Scott, 93 Fed. Rep. 418; *in re* Stevens, 107 Fed. Rep. 243; *in re* Meyers, 99 Fed. Rep. 691; *in re* Wilder, 101 Fed. Rep. 104; *in re* Falls City Shirt Co., 98 Fed. Rep. 592, 3 Am. B. R. 427.

In re Cathcart (Southern District of Ohio), mechanic's lien holders proved their claims as unsecured creditors and voted for and elected a trustee who reduced the estate to money. Thereafter these lien holders proved their liens and were permitted to amend their proof of claims and assert their security and were awarded priority over mortgagees under a mortgage subordinated to the mechanic's liens. Judge Thompson affirmed this ruling of the referee August 21st, 1902. (Case not reported.)

No. 56.

Proof of Debt Due Corporation. (1).

(Official Form No. 33.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, and made oath, and says that he is —— of the ——, a corporation incorporated by and under the laws of the state of ——, and carrying on business at ——, in the county of ——, and state of ——, and that he is duly authorized to make this proof, and says that the said ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows: _____

_____ _____

that no part of said debt has been paid]except_____

_____]; that there are no set-offs or counterclaims to the same]except_____

_____]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever. ——,

—— of said Corporation.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. ——,

[*Official character.*]

(1) The proof should be made by the treasurer, Gen. Ord. 21. See also note to Form No. 54.

No. 57.

Proof of Debt by Partnership. (1).

(Official Form No. 34.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, in said district of ——, and made oath, and says that he is one of the firm of ——, consisting of himself and —— ——, of ——, in the county of ——, and state of ——; that the said ——, the person by [*or,* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of —— dollars; that the consideration of said debt is as follows: ——————————————————————————————; that no part of said debt has been paid [except ——————]; that there are no set-offs or counterclaims to the same [except ——————————]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

——,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

——,
[*Official character.*]

(1) See note to Form No. 54.

No. 58.

Proof of Debt by Agent or Attorney. (1).

(Official Form No. 35.)

In the District Court of the United States for the —— District of ——.

In the matter of —— —— —— Bankrupt.	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, attorney [*or*, authorized agent], of ——, in the county of ——, and state of ——, and made oath, and says that ——, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——, in the sum of —— dollars; that the consideration of said debt is as follows: —————— ——————————————; that no part of said debt has been paid [except —————— ——————————————]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use, had or received any manner of security for said debt whatever. And this deponent further says that this deposition can not be made by the claimant in person because ———— ——————————————, and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—. ——,

[*Official character.*]

(1) See note to Form No. 54.

No. 59.

Proof of Secured Debt by Agent. (1).

(Official Form No. 36.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 19—, came ——, of ——, in the county of ——, and state of ——, attorney [*or*, authorized agent], of ——, in the county of ——, and state of ——, and made oath, and says that ——, the person by [*or*, against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ——, in the sum of —— dollars; that the consideration of said debt is as follows: ——————

——————————————————————————————;

that no part of said debt has been paid [except ——————

——————————————————————————];

that there are no set-offs or counterclaims to the same [except

——————————————————————————];

and that the only securities held by said —— for said debt are the following ——————————————

——————————————————————————————;

and this deponent further says that this deposition can not be made by the claimant in person because ——————————

——————————————————————————————,

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated. ——.

Subscribed and sworn to before me this —— day of ——, A. D 19—. ——,

[*Official character.*]

(1) See note to Form No. 54.

No. 60.

Affidavit of Lost Bill or Note.

(Official Form No. 37.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

On this —— day of ——, A. D. 19—, at ——, came —— ——, of ——, in the county of ——, and state of ——, and makes oath, and says that the bill of exchange [*or,* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit: ——————————

——————————————————————————————

——————————————————————————————

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor

has the said ——, or any person or persons, to their use, to this deponent's knowledge or belief, negotiated the said bill [*or,* note], nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

[*Official character.*]

No. 61.

Order Allowing Claim.

[*Caption.*]

This cause coming on to be heard upon the motion of the German Bank for allowance of its claim together with a lien by virtue of a mortgage, and after hearing counsel for the said bank and also counsel for the trustee and counsel for objecting creditors, it is now ordered that the claim of the said bank be and the same is hereby allowed for the sum of $—— as a general claim without security or preference, this being the amount of the claim with interest to the date of the adjudication in bankruptcy.

A. M.,
Referee in Bankruptcy.

No. 62.
Order Allowing Claims.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., referee in bankruptcy.

This cause coming on to be heard upon the claims of E. F., First National Bank and Third National Bank, and after hearing counsel for the parties and for creditors objecting to said claims, it is now ordered that the claim of E. F. be, and the same is hereby allowed for the sum of $——, as a general and unsecured claim; said sum being the balance due upon said debt, with interest to the date of adjudication. It is further ordered that the claim of the First National Bank be, and the same is hereby allowed for the sum of $—— as a general or unsecured claim, said sum being made up of the unpaid principal of said sum, to wit, $——, with interest to the date of adjudication. It is further ordered that the claim of the Third National Bank be, and the same is hereby allowed as a mortgage claim to the extent of $——, with interest thereon from the —— day of ——, that being the day demand by filing claims was made, until the same shall be paid, but this lien shall be subordinate to the mortgage of the S. Trust Company; and further the balance of the claim of the Third National Bank is allowed for the sum of $—— as a general or unsecured claim.

The question of priority between the Third National Bank and parties holding claims for labor performed and materials and supplies furnished is reserved.

A. M.,
Referee in Bankruptcy.

No. 63.
Order Disallowing Claim.

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

The claim of the E. F. Company having been presented

for allowance and objection thereto having been made by the trustee, now after hearing counsel in favor of and in opposition thereto, the said objection is sustained, and it is ordered that the said claim be, and the same hereby is, disallowed.

A. M.,
Referee in Bankruptcy.

No. 64.

Order Allowing Attorney Fee (1).

[*Caption.*]

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy:

The petition of the trustee for an allowance to R. X., Esq., for services rendered by him in securing the transfer of the fund from the state court to the trustee in bankruptcy coming on to be heard after notice to all counsel of record, and after hearing such counsel it is ordered that the said R. X., Esq., be, and he is, hereby allowed the sum of $500.00 for the services aforesaid, and the trustee is directed to pay said sum to him at once.

A. M.,
Referee in Bankruptcy.

(1) A referee may allow a reasonable attorney's fee as a part of the costs of administering an estate. *In re* Stotts, 93 Fed. Rep. 438; *in re* Tebo, 101 Fed. Rep. 419; *in re* Dreeben, 101 Fed. 110.

Reasonable fees have been allowed the attorney for the bankrupt in voluntary cases. Fifty dollars was allowed *in re* Beck, 92 Fed. Rep. 889; fifty dollars *in re* Kross, 96 Fed. Rep. 816, being thirty dollars for services prior to the application for discharge, and twenty dollars for prosecuting said application; two hundred dollars *in re* Burrus, 97 Fed. Rep. 926; fifty dollars *in re* Salaberry, 107 Fed. Rep. 95; fifty dollars *in re* Smith, 108 Fed. Rep. 39. Where a referee is not satisfied with the services rendered the bankrupt, he may suspend claim for a time owing to the absence of the bankrupt, but must make an allowance on such evidence as he may have within a reasonable time. *In re* Dreeben, 101 Fed. Rep. 110. A voluntary bankrupt cannot recover fees paid an attorney in preparing a petition and schedules or the deposit fee of twenty-five dollars. *In re* Matthews, 97 Fed. Rep. 772. A fee for the at-

torney for the trustee in voluntary proceedings has been allowed, *in re* Stotts, 93 Fed. Rep. 438; but see *in re* Smith, 108 Fed. Rep. 39, and a fee has been refused where bankrupt's attorney received from the bankrupt's brother a larger fee than he would ordinarily be allowed by the court out of the estate. *In re* O'Connell, 98 Fed. Rep. 83.

The attorney for the creditors in involuntary proceedings has been allowed a fee for services which varied according to the services rendered. One hundred dollars was allowed *in re* Harrison Mercantile Co., 95 Fed. Rep. 123; seventy-five dollars *in re* Woodard, 95 Fed. Rep. 955; two thousand dollars *in re* Curtis, 100 Fed. Rep. 784; fifteen hundred dollars *in re* Rude, 101 Fed. Rep. 805; seventy-five dollars *in re* Silverman, 97 Fed. Rep. 325, and twenty-five dollars *in re* Carolina Cooperage Co., 96 Fed. Rep. 950. Bankrupt's attorney in involuntary proceedings has been allowed a fee of twenty-five dollars per day for attending examinations, *in re* Mayer, 101 Fed. Red. 695, but was refused compensation for services defending the bankrupt against charges of fraud and concealment of assets or other matters involving the bankrupt's personal liability, civil or criminal, including a promised retainer, *in re* Mayer, 101 Fed. Rep. 695. The attorney for a trustee when such is deemed necessary is entitled to compensation. *In re* Little River Lumber Co., 101 Fed. Rep. 558. A trustee who was an attorney at law has been allowed compensation for his professional services such as he would have been obliged to pay had he employed other counsel, *in re* Mitchell, 1 Am. B. R. 687; to the same effect *in re* Welge, 1 Fed. Rep. 216, *contra in re* Muldaur No. 9905 Fed. Cas., S. C. 2 Ben. 65. The attorney for a trustee is not entitled to a fee for professional services for attending examinations where his services were rendered in behalf of creditors who were his real clients, *in re* Rozinsky, 101 Fed. Rep. 229, or in general where when the attorney for the trustee is also attorney for the creditors; *in re* Carolina Cooperage Co., 96 Fed. Rep. 950. A fee of seven hundred dollars has been allowed counsel for a receiver, *in re* Gerson, 2 N. B. N. & R. 497; but see *in re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528. Attorneys for creditors are not entitled to fees for attending creditors' meetings or procuring bidders for property at a sale, *in re* Harrison Mercantile Co., 95 Fed. Rep. 123; *in re* Rozinsky, 101 Fed. Rep. 229. The court will not enforce a provision in a mortgage for the payment "of an attorney's fee of ten per cent. of the amount of the debt," *in re* Roche, 101 Fed. Rep. 956.

Attorney's fees are costs of administration under the Bankrupt Act, sec. 64*b*, and are entitled to have priority. The amount may be fixed by the judge or referee without notice to creditors, *in re* Stotts, 93 Fed. Rep. 438. The amount rests in the discretion of the court, *in re* Beck, 92 Fed. Rep. 889; *in re* Burrus, 97 Fed. Rep. 926; *in re* Curtis (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 4 Am. B. R. 17; *in re* Tebo, 101 Fed. 419; *in re* Mayer, 101 Fed. Rep. 695, but this discretion may be reviewed on appeal, *in re* Roche (C. C. A., 5th Cir.), 101 Fed. Rep. 958, 4 Am. B. R.

369; *in re* Curtis (C. C. A., 7th Cir), 100 Fed. Rep. 784, 4 Am. B. R. 17.

A court of bankruptcy cannot ordinarily tax as costs attorneys fees upon the dismissal of a petition in involuntary bankruptcy, *in re* Ghilione, 93 Fed. Rep. 186. When, however, an application to seize and hold the property of the bankrupt pending the hearing has been granted and the petition afterwards dismissed, the court may allow attorneys fees as costs of the proceedings, *in re* Abraham (C. C. A., 5th Cir.), 93 Fed. Rep. 767 (785).

A court of bankruptcy has refused to dismiss a voluntary petition until the attorney for the trustee had been paid. *In re* Salaberry, 107 Fed. Rep. 95.

No. 65.

Order Allowing Attorney's Fees (Another Form) (1).

[*Caption.*]

This cause coming on to be heard upon the report of A. M., referee, upon application for the allowance of attorney's fees, the court upon consideration thereof does allow F. Y., R. Y. and R. S., attorneys for creditors, a joint fee in the sum of $——, but the court refuses to allow a fee to R. X., counsel for the bankrupt.

(1) See note to No. 64.

No. 66.

Petition to Expunge Claim (1).

District Court of the United States for the —— District of ——, —— Division.

In the matter of F. H., doing business as F. H. & Son, Bankrupt.

No. ——.

In Bankruptcy.

Respectfully represents B. S., trustee of the estate of said bankrupt, that the D. M. Grocery Co., which has this day filed its certain claim herein for allowance and which said claim has been allowed, has received preferences within the four months next immediately preceding the date of the filing

of the petition herein and have not surrendered the preferences so received.

Wherefore, he prays that said claim may be disallowed and expunged from the list of claims against the estate of said bankrupt.

B. S.,
Trustee.

(1) Bank. Ord. 21, par. 6.

No. 67.

Waiver of Notice (1).

The District Court of the United States
For the —— District of —— Division.

In the matter of F. H., doing business as F. H. & Son, bankrupt.

No. ——

In Bankruptcy.

The D. M. Grocery Company hereby waives the issuance and service of notice upon it as to the petition of the trustee heretofore filed herein asking that its claim heretofore allowed herein be disallowed and expunged from the list of claims against said estate and consents that said petition of said trustee may be heard on the —— day of ——, at 11 o'clock a. m.

The D. M. Grocery Co.

(1) If notice is not waived, formal notice should be given by mail to creditor. Bank. Ord. 21, par. 6.

No. 68.

Order that Certain Creditors Surrender Preferences Before Allowed to Prove Claims.

Order that certain creditors surrender preferences before allowed to prove claims.

The District Court of the United States
For the —— District of ——.

In the matter of
F. H.,
Bankrupt.

This cause coming on for hearing at an adjourned meeting of creditors held pursuant to adjournment on the —— day of —— 19—, and the court having heard all the evidence offered upon the matter of the objection of creditors to the claims of creditors who have received payments upon their claims since the —— day of ——, 19—, which motion of creditors was filed herein on the —— day of ——, 19—, and the court being fully advised, does find that the defendant was insolvent on the —— day of —— 19—, that the creditors hereinafter named received the payments hereinafter named upon their claims, since the —— day of —— 19—, and since the defendant became insolvent and within four months preceding the date of the assignment herein and the filing of the petition in bankruptcy herein by the plaintiff.

It is therefore considered, ordered and adjudged by the court that unless the creditors hereinafter named pay to the trustee herein the amounts so received by said creditors respectively since the —— day of —— 19—, and which amounts are set opposite their names, the claims of each of said creditors be, and the same are hereby rejected and disallowed. Said payments to said trustee herein shall be made

by said creditors, respectively, on or before the —— day of —— 19—.

D. & F., $——
L. T. Co., $——
A. P. & S. Co., $——

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Hess Spring & Axle Co. *vs.* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

The claims of creditors who have received preferences, voidable under Sec. 60, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under Sec. 67, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances. Sec. 59*g* of Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 69.

Order Disallowing and Expunging List of Claims (1).

The District Court of the United States
For the —— District of ——

In the matter of
F. H.,
Bankrupt.

At ——, in the —— District of ——, on the —— day of —— 19—.

In accordance with the order heretofore made and upon the evidence submitted to the court upon the following claims against the estate of said bankrupt, and it appearing that said claimants have failed to make repayments as heretofore ordered;

It is now ordered that the following claims herein be dis-

allowed and expunged from the list of claims upon the trustee's record in said case, viz:

N. H. Co., $——
M. Pub. Co., $——
C. Bending Wks., $——

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 70.

Order Reducing Claim (1).

(Official Form No. 38.)

In the District Court of the United States for the —— District of ——.

—— —— ——

In the matter of
—— —— —— In Bankruptcy.
Bankrupt.

—— —— ——

At ——, in said district, on the —— day of ——, A. D. 19—.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, *if the fact be so,* upon hearing counsel thereon], it is ordered that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest,* with interest thereon from the —— day of ——, A. D. 19—.]

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 57*k*. Gen. Ord. 21, par. 6. Loveland's Bankruptcy, sec. 139.

If a party in interest objects to the allowance of said claim he must assume the burden of proof, *in re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681, but see *in re* Wooten, 118 Fed. Rep. 670. Witnesses may be examined orally or by deposition and the hearing may be postponed for the purpose of obtaining evidence in relation to the claim; *in re* Sumner, 101 Fed. Rep. 224, 4 Am. B. R. 123, 2 N. B. N. 681; *in re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146. Where a respondent denied the alleged indebtedness to a petitioning creditor and evidence is offered and the court finds the allegations of the petition true and makes an adjudication the same question cannot be tried upon the petitioning creditor making proof of his claim; *in re* Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425.

The allowance or disallowance of a claim is largely in the discretion of the referee and his decision on the question of fact will not be reversed by a judge unless manifestly contrary to the weight of the evidence; *in re* Rider, 96 Fed. Rep. 811, 3 Am. B. R. 192, 3 N. B. N. 187.

Where no trustee has been appointed the bankrupt may move for a reexamination and expunction of a claim proved and allowed against his estate; *in re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 472. Consult also note to next form *post*

No. 71.

Order Expunging Claim (1).

(Official Form No. 39).

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—.

Upon the evidence submitted to the court upon the claim of —— against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered that said claim be disal-

lowed and expunged from the list of claims upon the trustee's record in said case. ——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 57*k*. Gen. Ord. 21, par. 6.

It has been held that the provisions relating to the examination of claims does not apply to claims for expenses of administration, such as charges and expenses of a receiver. *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49, 3 N. B. N. 328.

The burden of proof is upon the creditor asking the re-examination to establish the facts which he alleges. *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

An objection to a petition for re-examination on the ground that it lacks particularity should be raised by a motion to make more definite and certain. *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 472, 2 N. B. N. 148.

An inequitable claim has been expunged. *In re* Knox, 98 Fed. Rep. 585, 3 Am. B. R. 371. See also *in re* Flick, 105 Fed. Rep. 593, 5 Am. B. R. 465, 3 N. B. N. 71. So also a claim barred by the statute of limitations. *In re* Lipman, 94 Fed. Rep. 353, 2 Am. B. R. 46.

No. 72.

Petition and Order for Sale by Auction of Real Estate (1).

(Official Form No. 42.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

Respectfully represents ——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by

auction, in lots or parcels, and upon terms and conditions as follows: _____
Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 49, clause 1, and sec. 2, clause 7; Gen. Ord. 18.

The court may order a sale of real estate either subject to or free of liens when the interest of the general creditors would be advanced by such a sale. *In re* Worland, 92 Fed. Rep. 893, 1 Am. B. R. 450; *in re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 924; *in re* Shaeffer, 5 Am. B. R. 248; *in re* Sanborn, 3 Am. B. R. 54.

A sale subject to encumbrances includes lien for municipal claims, and where twelve parcels of real estate sold for a lump sum — municipal lien on two, cannot be paid out of proceeds of sale. *In re* Gerry, 7 Am. B. R. 461.

It has been held that a wife, who was also a creditor and claimant of an interest in the real estate, cannot redeem from a sale by the trustee under an order of the referee. *In re* Novak, 7 Am. B. R. 267. The trustee has a right to redeem property sold under a decree of foreclosure. *In re* Novak, 7 Am. B. R. 27.

Sums to be paid upon secured claims or other claims entitled to priority or payment were not "dividends" upon which the trustee or referee may receive a commission. *In re* Utt (C. C. A., 7 Cir.), 105 Fed. Rep.

754, 5 Am. B. R. 387; *in re* Fielding, 96 Fed. Rep. 800, 3 Am. B. R. 135; *in re* Mammoth Pine Lumber Co., 116 Fed. Rep. 731; *in re* Epstein, 109 Fed. Rep. 878, 6 Am. B. R. 191. But they are now under sec. 9 of the Act of February 5, 1903, amending sec. 40*a* of Act of 1898.

No. 73.

Petition and Order for Redemption of Property from Lien (1).

(Official Form No. 43.)

In the District Court of the United States for the —— District of ——.

In the matter of —— Bankrupt.	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or, if the property be personal property,* has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days'

notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 74.

Petition to Sell Real Estate Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.
To the Honorable ——
Judge of the District Court of the United States,
For the —— District of ——

The plaintiff C. C., respectfully represents to the court that upon the —— day of ——, 19—, P. R. and others instituted a proceeding, No. —— in this court, to have F. H. declared an involuntary bankrupt; that on the —— day of ——, 19—, the defendant, F. H., was adjudicated a bankrupt in said cause; that on the —— day of ——, 19—, the plaintiff, C. C. was elected trustee in bankruptcy, and immediately accepted the trust and qualified.

Plaintiff further represents to the court that at the time F.

H. was adjudicated a bankrupt he was possessed of the following real estate situated in —— county, ——, to wit:

[*Follow with description of real estate.*]

That the title to said property by operation of law is now vested in this plaintiff as trustee in bankruptcy.

That on the —— day of ——, 19—, after due notice to all parties interested, this plaintiff, as Trustee in Bankruptcy, of F. D., was authorized and directed to bring an action to sell the real estate of said F. H. free from all liens and claims whatsoever; that after the appointment and qualification of the plaintiff as trustee he had the aforesaid real estate appraised, and that the appraisement of Lot No. ——, firstly described above, was returned at $——; that of Lot No. —— secondly described above, was returned at $——; that of Lot No. ——, thirdly described above, was returned at $——.

Plaintiff further represents to the court that the U. Savings Bank, a corporation under the laws of ——, claims to hold a mortgage upon all the aforesaid lots; that the W. G. Bank, a corporation under the laws of ——, claims to hold two mortgages upon Lot —— firstly described above; that O. E. H. claims to have some interest in said Lot No. —— first described above, by way of mortgage; that the defendant O. E. H., wife of the said F. H., claims an inchoate right of dower in said premises.

That plaintiff further represents that, in order to properly administer the estate of the bankrupt, F. H., it is necessary to sell the above described real estate free from all liens and other claims, and to marshal liens; that all the defendants have consented in writing that this proceeding should be brought in the District Court of the United States for the —— District of ——.

Wherefore, the plaintiff C. C., Trustee in Bankruptcy, prays that subpœnas may issue to F. H., O. E. H., the U. Savings Bank and the W. G. Bank commanding them to set up by answer what claim, if any, each has in said premises herein-

before described; that an order may issue to the plaintiff herein as Trustee in Bankruptcy of F. H., to sell the above described premises at such time and upon such terms as the court may direct free from the liens and claims of these defendants, and free from the dower interest of the said O. E. H.; and that the funds arising from said sale be paid into court for further order; that the liens of the defendants be marshalled, and for all relief that may be necessary and proper in the premises.

C. C.,
Trustee in Bankruptcy of F. H.

R. X. & Y.,
Attorneys for Trustee.
(Affidavit).

(1) Taken from the record *in re* Nicholas Wolff, pending the District Court of the United States for the Southern District of Ohio.

No. 75.

Decree for Sale Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This day this cause came on to be heard upon the petition of plaintiff, C. C., trustee, and the answers and cross-petitions of O. E. H., the U. Savings Bank, a corporation under the laws of ——, the W. G. Bank, a corporation under the laws of ——, defendants, and the court finds that it is necessary for the proper administration of the trust of the plaintiff, C. C., Trustee in Bankruptcy of F. H., that the real estate described in his petition should be sold at public sale free from the claims of the defendants herein; and it fur-

ther appearing to the court that the property has already been appraised by appraisers appointed by the referee it is ordered that such appraisement be considered an appraisement for the purposes of this sale.

It is therefore ordered, adjudged and decreed that an order for sale of the various four parcels of real estate described in the petition, issue to C. C., Trustee in Bankruptcy, authorizing and directing him to sell all such property either separately or collectively as to him may seem for the best interests of the estate, as upon execution of property sold by the marshal; that he advertise and sell such parcels either separately or collectively on the premises for not less than —— of their respective appraised values; that he may sell for cash or —— cash, balance in —— and —— years, deferred payments to be secured by mortgage on the premises with interest at six per cent. per annum; and for good cause shown, advertisement in a German newspaper is dispensed with.

The trustee is further ordered to make due return of the order of sale issued herein, and to bring the proceeds of such sale into court for further order herein.

And on motion of the plaintiff, and for good cause shown, the trustee is authorized to employ an auctioneer to conduct the sale who shall receive as compensation a sum not to exceed —— per cent. of the proceeds of the sale, and he may expend the sum of $—— for extra advertising, which compensation and sum shall be taxed as part of the costs herein.

It is further ordered that the sale of said premises free and clear of the dower interest of the defendant O. E. H., shall be without prejudice to her right to have the value of said dower interest ascertained upon the coming in of the report of any sale made hereunder, and that when the value of said dower interest is ascertained, that the same be paid to her out of the proceeds of said sale, but without prejudice to the rights, if any, of the defendants, the U. Savings Bank and the W. G. Bank, under their mortgages set up in their re-

spective answers and cross-petitions filed herein, in the value of said dower interests.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

A court of bankruptcy has power to decree a sale free from liens. Chauncey *vs.* Dyke Bros. (C. C. A.) 119 Fed. Rep. 1.

It is in the province of the referee to direct the manner of sale free and clear of incumbrances, and he may preserve and transfer *bona fide* liens to the fund arising from the same. Trust Co. *vs.* Benbow, 3 Am. Bankr. R. 9, 96 Fed. 514; *in re* Cobb, 3 Am. Bankr. R. 129, 96 Fed. 821. *in re* Pittelkow, 1 Am. Bankr. R. 472, 92 Fed. 901; *in re* Matthews, 6 Am. Bankr. R. 96, 109 Fed. 603; *in re* Kellogg, 7 Am. Bankr. R. 623, 113 Fed. 120.

No. 76.

Final Entry of Distribution on Sale of Real Estate Free from Liens (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This day came the parties hereto, and this cause having been referred to A. M., as Special Master and said Special Master having heard the testimony and determined the questions submitted to him in accordance with this decree, and the parties hereto being satisfied with said determination and desiring to avoid the additional expense of a report by said Special Master, by consent of court, a report of the said Special Master herein is hereby waived.

And the court now coming on to distribute the proceeds of the sales herein, remaining in the hands of C. C., trustee herein, amounting to the sum of $—— does find, and the parties hereto consent thereto, as follows, viz:

The court does find that the defendant, the W. G. Bank has

the first and best lien upon the proceeds arising from the sale of Lot No. —— and the defendant, the U. Savings Bank has the first and best lien upon the proceeds arising from the sale of Lots No. —— and No. —— herein; that the defendant O. E. H., wife of the defendant F. H., is not entitled to any dower in the proceeds arising from sales of any of the lots herein.

The court does find that there are unpaid street assessments due the city of —— upon Lot No. —— amounting to the sum of $—— which should be paid out of the proceeds of the sale of said Lot No. —— before any payment is made to the said W. G. Bank.

The court does find that there are unpaid street assessments due the city of —— upon Lots No. ——, and No. —— herein amounting to the sum of $——, which should be paid out of the proceeds of the sales of said lots, before any payment is made to the said U. Savings Bank.

The court does find that there should be paid by the parties hereto as compensation for the services of the Special Master herein, including the payment of stenographer's services by said Special Master, and also the sum of $—— due the clerk of this court for entering this decree, by said Special Master, the aggregate sum of $—— for his services herein, and which sum should be borne by the parties hereto in proportion to their respective claims herein, to wit: $—— thereof by the W. G. Bank, and $—— by the U. Savings Bank.

The court does find that the proceeds of the sale of said Lot No. —— amounted to $——, from which after deducting the sum of $—— the proportionate part of costs and expenses already paid herein, there is left the sum of $—— and from which after deducting the sum of $—— for street assessments and $—— for Special Master herein, there is left the sum of $——, which should be paid over and distributed to the defendants, the W. G. Bank upon the notes set up by it in its answer and cross-petition herein.

The court does find that the proceeds of the sale of Lots No.

——, and No. —— amounted to $——, from which after deducting the sum of $——, the proportionate part of costs and expenses already paid herein, there is left the sum of $—— and from which after deducting the sum of $—— for street assessments and $—— for the Special Master herein, there is left the sum of $——, which should be paid over and distributed to the defendant, the U. Savings Bank, upon the note set up by it in its answer and cross-petition herein.

It is therefore considered, ordered and adjudged by the court, with the consent of parties hereto, that the said sum of $—— in the hands of the trustee herein, be, and the same is hereby distributed and said trustee is hereby ordered and directed to pay the same as follows; to wit:

First. To A. M., for his services as Special Master herein, including stenographer's costs and $—— to the clerk of this court, the sum of $——.

Second. To J. K., Treasurer of the city of —— in full of unpaid street assessments on the lots sold herein, said sum of $—— and $—— amounting in all to $——.

Third. To the W. G. Bank upon the notes set up in its answer and cross-petition herein the sum of $——.

Fourth. To the U. Savings Bank upon the note set up in its answer and cross-petition herein the sum of $——.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 77.

Petition and Order for Sale Subject to Lien. (1).

(Official Form No. 44.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien or other incumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the incumbrance thereon.

Dated this —— day of ——, A. D. 190—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keep-

ing an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 78.

General Notice of Petition to Sell Real Estate.

The District Court of the United States
For the —— District of ——

In the matter of A. B., Bankrupt.	No. —— In Bankruptcy.

To the Creditors of A. B., Bankrupt:

You are hereby notified that on Wednesday, ——, at 2 o'clock p. m., at my office, southwest corner of Third and Walnut streets, ——, I wil hear the petition hereto annexed and make such order as may seem proper and for the best interests of the estate of bankrupt. Your attendance at said meeting is requested.

A. M.,
Referee in Bankruptcy.

Dated at ——.

No. 79.

Trustee's Petition to Sell Portion of Bankrupt's Estate, Subject to Incumbrances (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

Respectfully represents C. C., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: Lot No. —— in E. J. M.'s first subdivision of ——, is subject to a mortgage to the C. B. Loan & Savings Company of ——, in the sum of $—— and is also subject to the dower right of O. E. H., wife of bankrupt, and taxes and assessments, and that it would be for the benefit of said estate that said real estate should be sold, subject to the said mortgage and dower.

Wherefore he prays that he may be authorized to make sale of said real estate subject to the incumbrances thereon.

Dated this —— day of —— 19—.

C. C.,
Trustee in Bankruptcy.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 80.

Order Authorizing Trustee to Sell Portion of Bankrupt's Estate, Subject to Incumbrances. (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

This cause coming on for hearing on the petition of the trustee to sell the real estate of bankrupt, subject to liens, and

said petition having been filed on the —— day of ——, 19—. and having come on for hearing before me this day, of which hearing more than —— days notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat, it is ordered that the trustee herein be authorized to sell the portion of bankrupt's estate referred to in his petition, subject to the liens, etc., thereon, at private sale. The trustee is directed to advertise on the —— day of ——, 19—, in the C—— Index, for bids to be sent to the trustee up to —— o'clock on the —— day of ——, 19—. Said trustee is directed to report said bids at a hearing before the undersigned referee on the —— day of ——, 19—, at which time an adjourned meeting will be held for the purpose of accepting or rejecting the highest and best bid so received. Said bids shall be for cash, on confirmation by the court.

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 81.

Notice of Trustee's Sale Subject to Liens.

The District Court of the United States
For the —— District of ——
—— Division No. ——
In re Bankruptcy of F. H.

In pursuance of an order to me directed, I will receive at my office, southwest corner of Third and Walnut streets, ——, up to 2 o'clock p. m., on ——, bids for the purchase of the bankrupt's real estate, known as No. —— K. avenue, ——, and being Lot —— in E. J. M.'s first subdivision of ——, subject to a mortgage to the C. B. Loan and Savings Company of ——, in the sum of about ——, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes

and assessments. Terms of sale to be cash on confirmation by the court. All bids will be reported by me at an adjourned meeting of creditors held before A. M., Referee in Bankruptcy, southwest corner Third and Walnut streets, ——, on ——, at 2 o'clock p. m., for the action of said referee.

C. C.,
Trustee in Bankruptcy.

No. 82.

Report of Trustee of Sale Subject to Incumbrances (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.
To A. M., Esq.,
Referee in Bankruptcy.
Dear Sir:

The undersigned trustee herein begs to report that in accordance with the order of court, he advertised for bids for the purchase of the bankrupt's real estate, known as No. —— K. avenue —— and being Lot No. —— in E. J. M.'s first subdivision of ——, subject to the mortgage of the C. B. Loan & Savings Company of ——, and also subject to the dower right of O. E. H., wife of bankrupt, and to taxes and assessments. Publication of notice was made in the C. I. on the —— day of ——, 19—, and copies of said publication were also mailed to all creditors, proof of publication of notice in the C. I. is hereto attached and also copy of notice sent to all creditors.

The undersigned trustee reports that he has received the bid hereto attached of O. E. H., offering to pay the sum of $—— for said real estate, subject to said liens, etc. The under-

signed trustee reports that said bid was the only bid received by him and he recommends the acceptance of said bid and asks for such order as the court may see proper to make in the premises.

C. C.,
Trustee in Bankruptcy.

—— day of ——, 19—.

(1) Taken from the record *in re* Frederick J. Bradshaw, pending in the District Court of the United States for the Southern District of Ohio.

No. 83.

Petition and Order for Private Sale. (1).

(Official Form No. 45.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

Respectfully represents ——, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit: ——————————

———————————————————————

———————————————————————

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:

———————————————————————

———————————————————————

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ——, A. D. 19—.

——,
Trustee.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition and —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

(1) See note to Form No. 72.

No. 84.

Petition and Order for Sale of Perishable Property (1).

(Official Form No. 46.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt —— —— ——	In Bankruptcy.

Respectfully represents ——, the said bankrupt [*or*, a creditor, *or*, the receiver, *or*, the trustee of the said bankrupt's estate].

That a part of the said estate, to wit:——————————

———————————————————————————

———————————————————————————

now in ——, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ——, A. D. 189—.

——.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [*or*, without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or*, after hearing —— in favor of said petition, and —— in opposition thereto], I find that the facts are as above stated and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189—.

——.

Referee in Bankruptcy.

(1) Gen. Ord. 18, par. 3.

An order of sale ought not to be made until after an adjudication of bankruptcy, unless the property is of such a nature that immediate sale is necessary to preserve its value. *In re* Kelley Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528.

In re Beutel's Sons, 7 Am. B. R. 768, stock of hardware was held not to be "perishable property."

No. 85.

Order for Sale of Uncollected Accounts (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

For good cause shown, and in pursuance of direction of creditors the trustee herein is hereby ordered and directed to advertise for bids for uncollected accounts remaining in the hands of the trustee herein and uncollected. Said advertise-

ment shall give ten days' notice of the time and place when the trustee will receive bids, and such notice shall be advertised once in the —— Enquirer and once in the —— Tribune. Said bids shall be for cash, upon the confirmation of bid by the court. Said trustee is directed to return his report of bids without unnecessary delay.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 86.

Notice of Sale of Uncollected Accounts (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

In pursuance of an order directed to me on the matter of the bankruptcy of F. H., No. ——, in the District Court of the United States for the —— District of ——, I will receive bids for the purchase of all the uncollected accounts of the said F. H., remaining in my hands as trustee, at my office Room —— Building ——, up to the —— day of ——, 19—, at —— o'clock.

Terms of sale, cash on day of sale, subject to confirmation by the court. The right is reserved in the court to reject any or all bids. A list of such uncollected accounts can be seen at my office on application to the undersigned. C. C.,
Trustee in Bankruptcy.

—— day of ——, 19—.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 87.

Notice of Sale of Bank Stock (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.

Notice is hereby given pursuant to an order made in the matter of the bankruptcy of F. H., No. —— in the District Court of the United States for the —— District of ——, we will on behalf of the Trustee in Bankruptcy of said F. H., and of all others concerned, offer at public sale to the highest and best bidder on the —— day of ——, 19—, at —— o'clock, at the —— Stock Exchange, No. —— street, —— shares of the capital stock of the W. G. Bank of ——, each of said shares being of the par value of $——. Terms of sale cash on confirmation of sale by the court.

I. B. & Company.

—— day of —— 19—.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 88.

Report of Sale of Bank Stock (1).

The District Court of the United States
For the —— District of ——
In the matter of
F. H.,
Bankrupt.
To the Referee in the Said Above Cause:

The undersigned auctioneers herein, beg to report that in pursuance of the order of court they sold on the —— day of

——, 19—, at the Stock Exchange in —— shares of stock of the W. C. Bank, each share of the par value of $—— to C. M., at $——, making a total for said —— shares of $——. We attach hereto copy of advertisement and bill for the same. The costs of said sale have been $——, for advertising, and $—— for our commission. The balance amounting to $—— will be paid over to C. C., trustee, on confirmation of said sale. We respectfully ask that the sale be confirmed.

I. B. & Company.

(1) Taken from the record *in re* Nicholas Wolff, pending in the District Court of the United States for the Southern District of Ohio.

No. 89.

Report of Trustee's Sale of Unmanufactured Stock (1).

The District Court of the United States

For the —— District of ——

In the matter of

F. H.,

Bankrupt.

Pursuant to an order to me directed as Trustee in Bankruptcy of F. H., bankrupt, No. —— District Court of the United States, —— District of ——, I will on the —— day of ——, 19—, at —— o'clock, on the premises on —— street, ——, offer at public sale all the goods, chattels and personal property of said bankrupt [*except book accounts and cash on hand*], consisting of unmanufactured stock used in the manufacture of ——, as per inventory on file with A. M., Referee in Bankruptcy, and a copy of which can be seen at my office No. ——, street, ——. Terms of sale to be cash upon the confirmation by the court. Said property to be sold as an entirety. The highest and best bid to be returned to said court for confirmation or other action on the —— day of ——, 19—.

C. C.,

Trustee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 90.

Notice of Petition and Sale of Chattels (1).

The District Court of the United States
The —— District of ——.
—— Division.
In the matter of
A. B.,
In Bankruptcy.

This day the trustee filed his petition for authority to sell the stock of goods of the bankrupt in lots at public auction to the highest bidder without reserve; said petition will come on for hearing at the office of the undersigned 1603 Union Trust Building, ——, on ——, at —— o'clock —m., and if not then otherwise ordered said sale will be ordered and held ——, as advertised.

M. W.,
Referee.

Dated at ——.

(1) The above form of notice has been used when it was advisable to save time, and the necessity of giving a second notice of sale for ten days after sale is ordered.

No. 91.

Trustee's Report of Exempted Property (1).

(Official Form No. 47.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

At ——, on the —— day of ——, 19—.

The following is a schedule of property designated and set

apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the Acts of Congress relating to bankruptcy:

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments			
Property exempted by state laws			

——,
Trustee.

(1) B. A. 1898, sec. 47, clause 11. Loveland's Bank secs. 177, *et seq.*

No. 92.

Trustee's Return of no Assets.

(Official Form No. 48.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

On the day aforesaid, before me comes ——, of ——, in the county of ——, and state of ——, and makes oath and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 19—.

——,
Referee in Bankruptcy.

No. 93.

Account of Trustee (1).

(Official Form No. 49.)

Dr.	*The estate of —— ——, bankrupt, in account with ——, trustee.*						Cr.			
		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

(1) B. A. 1898, sec. 47, clause 10. Gen. Ord. 17.

Compensation of trustees: Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars, and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition. Sec. 48*a* of Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 94.

Oath to Final Account of Trustee.

(Official Form No. 50.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

On this —— day of ——, A. D. 19—, before me comes ——, of ——, in the county of ——, and state of ——, and makes oath, and says that he was, on the —— day of ——, A. D. 19——, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed, containing —— sheets of paper, the first sheet whereof is marked with the letter ——[*reference may here also be made to any prior account filed by said trustee*],

is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——,
Trustee.

Subscribed and sworn to before me at ——, in said —— district of ——, this —— day of ——, A. D. 19—.

——,
[*Official character.*]

No. 95.

Order Allowing Account and Discharging Trustee.

(Official Form No. 51.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

——,
Referee in Bankruptcy.

No. 96.

Notice of Filing Account, Declaration of Dividends, etc.

The District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing $—— balance on hand, and that the final meeting of the creditors of said bankrupt will be held at the office of the undersigned, 1603 Union Trust Building, ——, on the —— day of ——, at 2 o'clock p. m., when the creditors may object to the confirmation of said account, transact other business, and the court will make allowances to counsel for bankrupt and trustee, and will declare a dividend to the creditors who have proved their claims to be paid by the trustee five days thereafter.

M. W.,
Referee in Bankruptcy.

Dated ——.

No. 97.

Notice.

The District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt } In Bankruptcy.

To the Creditors of the Above Named Bankrupt:

Notice is hereby given that the trustee has filed his final account showing no property other than the bankrupt's exemp-

tions, and that the final meeting of the creditors of said bankrupt will be held at the office of the undersigned, 1603 Union Trust Building, ——, on the —— day of —— at 2 o'clock p. m., when the creditors may object to the confirmation of said account, and transact other business.

M. W.,
Referee in Bankruptcy.

Dated at ——.

No. 98.

List of Claims and Dividends to be Recorded by Referee and by him Delivered to Trustee. (1).

(Official Form No. 40.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 19—.

A list of debts proved and claimed under the bankruptcy of ——, with —— dividend at the rate of —— per cent. this day declared thereon by ——, a referee in bankruptcy.

No	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

——,

Referee in Bankruptcy.

(1) B. A. 1898, sec. 39, clause 1.

No. 99.

Notice of Dividend (1).

(Official Form No. 41.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To ——,

Creditor of ——, bankrupt.

I hereby inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you can not personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

——,
Trustee.

CREDITOR'S LETTER TO TRUSTEE.

To ——,

Trustee in bankruptcy of the estate of ——, bankrupt:

Please deliver to —— the warrant for dividend payable out of the said estate to me.

——,
Creditor.

(1) "The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends, subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order; provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed. And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared." Sec. 65*b* of the Bankruptcy Act, as amended by act of Feb. 5, 1903.

No. 100.

Order for Costs and Confirming Accounts (1).

The District Court of the United States

For the —— District of ——

In the matter of

F. H.,

Bankrupt.

At ——, in the —— District of —— on the —— day of —— A. D. 19—.

This cause coming on for hearing after due notice by mail to each creditor:

It is ordered that the following sums be paid as costs, commissions and fees herein, to wit:

C. C., Trustee's Commissions,	$——
A. M., Referee's Commissions,	$——
B. R., Clerk's Costs,	$——
C. I., Publications, etc.,	$——
C. I., For Discharge,	$——
A. M., Stationery,	$——
T. M. S., Stenographer, etc.,	$——
G. O., Services in Rejecting Claims	$——
Total	$——

It is further ordered that the amended account of the trustee, filed the —— day of ——, 19—, and the amended account of the receiver, filed the —— day of —— 19—, herein, having been examined and found correct are each hereby allowed.

A. M.,
Referee in Bankruptcy.

(1) Taken from the record *in re* Eagle Carriage Co., pending in the District Court of the United States for the Southern District of Ohio.

No. 101.

Order for Choice of New Trustee (1).

(Official Form No. 55.)

In the District Court of the United States for the —— District of ——.

—— —— —— In the matter of —— —— —— Bankrupt. —— —— ——	In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

Whereas, by reason of the removal [*or*, the death, *or*, res-

ignation] of ——, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee.

It is ordered that a meeting of the creditors of said bankrupt be held at ——, in ——, in said district, on the —— day of ——, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

——,
Referee in Bankruptcy.

(1) B. A. 1898, sec. 44 and 50*c*.

No. 102.

Notice of Final Meeting of Creditors.

The District Court of the United States
For the —— District of ——
No. ——

In re Bankruptcy of A. B.

To the Creditors of A. B., in the County of —— and District Aforesaid, a Bankrupt:

Notice is hereby given that on Tuesday, the —— day of ——, at 3 o'clock p. m., there will be a final meeting of the creditors of the above named bankrupt held at the office of the undersigned referee, southwest corner of Third and Walnut streets, ——, for the purpose of passing upon the accounts of the trustee, declaring a dividend, authorizing the sale of uncollected accounts at a sum to be fixed, and transacting such other business as may properly come before said meeting, and finally closing the affairs of the estate of said bankrupt.

Your presence is requested at said meeting.

A. M.,
Referee in Bankruptcy.

Dated at ——

No. 103.

Record of Proceedings Before Referee — No Trustee and no Assets (1).

In the District Court of the United States
For the —— District of ——
—— Division.

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy. Record of Proceedings Before Referee.

At —— in said District.
Date.

	Order of reference, petition and schedules received from clerk.
	.....
	Bankrupt directed to attend before referee on —— at —— m., being the time fixed by order of reference.
	.....
	.....
	Ordered that first meeting of creditors be held on —— at ——.
	.....
	Notice of first meeting of creditors published —— times in the newspaper designated by the court.
	.....
	.....
	Notice of first meeting of creditors mailed to each creditor listed in schedules.
	.....
	Proof of publication and mailing of notice of first meeting filed.

Date.	
	.... Held first meeting of creditors; bankrupt present and examined by ——; schedule disclosing no assets and no creditor appearing, ordered that no trustee be appointed and no other meeting of the creditors be called. .... Forwarded record of proceedings to clerk. ..... Expenses incurred.

	$	cts.
.....	.....	....
.....	.....	....
.....	.....	....

Date.	List of Claims Filed with Referee.	Dollars.	Cents.

[*Add certificate of referee No.* 106.]

(1) This form is conveniently used as a docket containing the steps of the case. With it should be bound all the orders made by the referee and copies of notices as exhibits, the whole constituting the separate record book of the case, as required by Bank. Act 1898, sec. 42*b*.

When the same is transmitted to the clerk at the conclusion of the case (Bank. Act 1898, sec. 39*a*, cl. 7) the form of certificate No. 1216 may be used.

No. 104.

Record of Proceedings Before Referee, Claims Proved, Trustees Appointed, Assets Distributed.[1]

[*Proceed as in Form No.* 103 *to "held first creditors' meeting," etc., and then proceed as follows:*]

Date.	
	First meeting of creditors held and —— appointed trustee by creditors *or* referee, creditors failing to appoint, and bond of trustee fixed at $—— notified trustee of —— appointment.
	Received acceptance of trust from trustee.
	.....
	Bond of trustee presented and approved.
	.....
	.....
	.....
	Appointed —— appraisers to appraise real *and* personal property of bankrupt.
	Received report of appraisers.
	.....
	.....
	.....
	Received report of trustee of moneys in —— hands, of no assets.
	Prepared dividend sheets showing —— per cent. of each claim allowed.
	Received final account of trustee.
	Examined the account of ——.
	.....
	.....
	.....
	Entered order discharging trustee.
	Forwarded copy of proceedings to clerk.

Date.	Expenses Incurred.	Dollars.	Cents

Date.	List of Claims Filed with Referee.	Dollars.	Cents

[*Add certificate of reference No.* 106.]

(See note to No. 103.

No. 105.

Record of Proceedings Before Referee on Composition.[1]

[*Proceed as in Form No.* 103 *to "held first creditors' meeting," etc., and proceed as follows:*]

Date.

First meeting of creditors held and —— appointed trustee by referee, creditors failing to appoint and bond of trustee fixed at $——.

Notified trustee of his appointment.

Received acceptance of trust from trustee.

Bond of trustee presented and approved.

Received order referring petition of bankrupt for composition ——.

Entered order fixing —— at —— for meeting of creditors to consider composition ——.

Mailed notices to all creditors, mentioned in schedules, of meeting to consider composition.

Meeting of creditors to consider composition held —— per cent. accepted by creditors.

. . . . . .

. . . . . .

. . . . . .

Made report to court of proceedings before me on petition for composition.

Forwarded record of proceedings to clerk.

Date.

Date.	Expenses Incurred.	Dollars.	Cents.

Date.	List of Claims Filed with Referee.	Dollars.	Cents.

[*Attach certificate Form No.* 106.]

(1) See note to No. 103.

No. 106.

Certificate of Referee to Record of Proceedings.

In the District Court of the United States
For the —— District of ——
—— Division.
In the matter of } No. ——
A. B., } In Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that the foregoing is the true and complete record of the proceedings had before me in the above entitled matter, which, together with such papers as are on file before me, I herewith transmit to the court.

Dated at —— the —— day of —— 190—.

A. M.,
Referee in Bankruptcy.

COMPOSITION WITH CREDITORS.

No. 107.

Petition for Meeting to Consider Composition (1).

(Official Form No. 60.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——:

The above-named bankrupt respectfully represent that a composition of —— per cent. upon all unsecured debts, not entited to a priority —— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the Acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of —— creditors whose claims are allowed.

Wherefore, they pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

——,
Bankrupt.

(1) B. A. 1898, sec. 12; Loveland's Bank., secs. 245 and 245.

The offer of composition should be made to all the creditors. *In re* Rider, 96 Fed. Rep. 808, 3 Am. B. R. 178.

It is not necessary to call a special meeting of the creditors to receive

an offer of composition. The submission of such offer may be made to the creditors at their first meeting after the examination of the bankrupt. *In re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

Where there has been a composition it will not be set aside on the ground that one of the creditors has failed to get notice of the proceedings because his address was incorrectly given in the bankrupt's schedule. *In re* Rudwick, 93 Fed. Rep. 787, 2 Am. B. R. 114.

No. 108.

Order for Meeting to Consider Composition.

In the District Court of the United States
For the —— District of ——

In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

On reading and filing the verified petition of A. B., the bankrupt showing that he verily believes that a composition upon all unsecured debts not entitled to a priority will be accepted by a majority in number and in value of his creditors whose claims are allowed.

It is ordered that a meeting of the creditors of said A. B., bankrupt, be held at —— before A. M., Esq., Referee in Bankruptcy, for the purpose of considering the composition proposed to be offered in satisfaction of the debts due from said bankrupt to his creditors and that notice of the time, place and purpose of said meeting be sent by said above named referee, by mail, to each of the known creditors of said bankrupt whose name and address appear in schedules on file in this matter at least ten days prior to the day appointed for the holding of such meeting.

Witness the Honorable G. R., Judge of the said court, and the seal thereof, at ——, this —— day of —— A. D., 190—.

B. R.,
Clerk of Said Court.

No. 109.

Notice to Creditors of Meeting to Consider Composition.

In the District Court of the United States
For the —— District of ——
In the matter of
A. B.,
Bankrupt. } In Bankruptcy.

Notice to creditors to consider composition offered by bankrupt.

Take notice, that a meeting of the creditors of the above named bankrupt will be held at Room 13, third floor, Post-office Building, city of ——, before the undersigned Referee in Bankruptcy, on the —— day of —— 190— at —— o'clock a. m., for the purpose of considering a proposed composition made by the said bankrupt to his creditors in satisfaction of the unsecured debts, [not entitled to priority] owed by him to each of said creditors, which proposed composition is to pay —— per cent.

A. M.,
Referee in Bankruptcy.

I hereby certify that I have on this —— day of —— A. D., —— sent by mail copies of the above notice of the meeting for composition and have duly published the same, as appears from the proof of publication hereto annexed.

A. M.,
Referee.

No. 110.

Report of Referee on Composition.

In the District Court of the United States
For the —— District of ——.
In the matter of
A. B.,
Bankrupt. } Referee's Report.

Pursuant to an order made by the court on the —— day of —— 190—, a meeting of the creditors of the above named

bankrupt to consider a composition of —— per cent. upon all unsecured debts not entitled to a priority in satisfaction of said debts, was on the —— day of ——, A. D. 190—, held before me at Room 13, Union Trust Building in the city of ——, at —— o'clock in the forenoon of the said day.

Proof of mailing of notice to each of the creditors, mentioned in the bankrupt's schedules, of the time, place, and purpose of said meeting, is hereto annexed.

That the said above named bankrupt was present at the said meeting and offered himself for examination by any of the creditors represented at said meeting.

That an offer of composition with his said creditors was accepted by a majority in number and in value of all his creditors whose claims have been allowed, which acceptance is hereto annexed and made a part of this report.

Proofs of claims of creditors voting for said composition were presented and allowed before signing of said resolution which are hereto annexed.

That the following are the names of those creditors who have presented claims against the said bankrupt's estate and were duly allowed, but who did not consent to, or sign said composition. [*Set out list of names of such creditors and amount of claims proved.*]

No. 111.

Application for Confirmation of Composition (1).

(Official Form No. 61.)

In the District Court of the United States for the —— District of ——.

In the matter of —— Bankrupt.	In Bankruptcy.

To the Honorable ——, Judge of the District Court of the United States for the —— District of ——.

At ——, in said district, on the —— day of ——, A. D. 189—, now comes ——, the above named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or*, at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of —— dollars, has been deposited, subject to the order of the judge, in the —— National Bank, of ——, a designated depository of money in bankruptcy cases.

Wherefore, the said —— respectfully asks that the said composition may be confirmed by the court. ——,

Bankrupt.

(1) B. A. 1898, sec. 12 and sec. 2, clause 9. Loveland's Bank., sec. 246. The application for a confirmation must be made to the judge and the acceptance of the compromise offered by the creditors is not conclusive but may be disallowed by the court under sec. 27 of the Bankrupt Act. *In re* Heyman, 108 Fed. Rep. 207.

A composition will be confirmed when it appears to the court that the composition was fair and for the best interests of the creditors. *In re* Wilson, 107 Fed. Rep. 83, 5 Am. B. R. 849; City Nat. Bank *vs.* Doolittle (C. C. A., 5th Cir.), 107 Fed. Rep. 236, 5 Am. B. R. 737.

But where it is not for the best interests of the creditors the court will refuse to confirm and the decision of the trial judge will not be disturbed by an Appellate Court unless grossly biased. Adler *vs.* Jones (C. C. A., 6th Cir.), 6 Am. B. R. 245, 109 Fed. Rep. 967.

As to the duty of the referee and his authority arising out of applications for composition, see *in re* Hilborn, 104 Fed. Rep. 866, 4 Am. B. R. 741.

The specifications in opposition to an application for confirmation of a composition should be similar to those required in opposition to a discharge. City Nat. Bank *vs.* Doolittle (C. C. A., 5th Cir.) 107 Fed. Rep. 236, 5 Am. B. R. 736.

No. 112.

Order for Hearing on Petition to Confirm Composition.

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B.,
Bankrupt.
} In Bankruptcy.

At ——, in said district, on the —— day of —— A. D., —— on reading and filing the application of the above named bankrupt for confirmation of a composition offered, and it appearing satisfactorily to the court, from the report of A. M., Esq., referee, of all proceedings herein, that a majority in number and in value of his creditors whose claims have been allowed and whose claims were proved by proofs of claim presented to said referee, and which are presented to the court with said report did, at said meeting pass and vote [as appears by the said report of the proceedings of said meeting] in favor of a composition, which is set forth at length in said proceedings, resolving that the composition proposed by said bankrupt at said meeting shall be accepted in satisfaction of the unsecured debts due from said bankrupt to his creditors; now therefore on motion of R. X., Esq., attorney for said bankrupt.

It is ordered that a hearing in the matter of composition by said bankrupt be had before this court at the United States Court Rooms, Postoffice Building, in the city of ——, on the —— day of —— A. D., —— at 10 o'clock a. m., for the purpose of said court inquiring, upon hearing whether the said composition so proposed by said bankrupts has been passed in the manner directed by the Act of Congress relating to bankruptcy, approved July 1, 1898, and has been accepted by the signatures required by said act and whether it is for the best interest of the creditors; that a notice of the time, place and purpose of said hearing be sent by the clerk of

this court, by mail, to each of the creditors to their respective addresses as they appear in the list of creditors of the bankrupt or as afterwards filed with the papers in the case by the creditors (1) at least ten days prior to the said day appointed herein for such hearing.

(1) See Bank. Act 1898, sec. 58.

No. 113.

Order Confirming Composition (1).

(Official Form No. 62.)

In the District Court of the United States for the —— District of ——.

In the matter of —— —— —— Bankrupt.	In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be and it hereby is confirmed.

Witness the Honorable ——, judge of said court, and the seal thereof, this —— day of —— A. D. 19—.

[*Seal of the court.*]

——,
Clerk.

(1) B. A. 1898, sec. 2, clause 9 and sec. 12; Gen. Ord. 32. Loveland's Bank., sec. 249.

See note to form No. 111.

This order will not be entered until costs have been provided for by bankrupt or creditors. *In re* Harris, 9 Am. B. R. 20.

It has been held that an appeal will lie to an order refusing to confirm a composition. U. S. *vs.* Hammond, 104 Fed. Rep. 862, 4 Am. B. R. 736. But see Ross *vs.* Saunders (C. C. A., 1st Cir.), 105 Fed. Rep. 915, 5 Am. B. R. 350.

No. 114.

Order of Distribution on Composition.

(Official Form No. 63.)

United States of America:
In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

The composition offered by the above named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: *First.* To pay the several claims which have priority. *Second.* To pay the costs of proceedings. *Third.* To pay, according to the terms of the composition, the several claims of general creditors which have been allowed and appear upon a list of allowed claims on the files in this case, which list is made a part of this order.

Witness the Hon. ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 190—.

[*Seal of the court.*]

——,
Clerk.

PROCEEDINGS BEFORE JUDGE SUBSEQUENT TO ADJUDICATION.

No. 115.

Motion for Rule to Show Cause Against Bankrupt for Contempt.

[*Caption.*]

Now come the undersigned creditors herein, and move the court that a rule issue herein directing A. B., the bankrupt, to appear in this court at —— County of ——, on the —— day of —— 19—, at —— o'clock a. m., and show cause why an atachment for contempt should not issue against him for disobedience of the order of A. M., referee herein, a copy of which order is as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him, pay over to B. M., Esq., trustee, the sum of $—— and deliver to said trustee United States three per cent. coupon bonds, face value of $——, or $—— in money.

Second. That in the event of the said bankrupt A. B., failing or neglecting to obey this order to pay to the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee is hereby ordered and directed to institute proceedings against the above named A. B. in accordance with the provisions of Sections 29 of the Bankruptcy Act of 1898.

And it is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R. X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

E. F.,
G. H.,
By Y. & Y., their Attorneys.

No. 116.

Affidavit of Trustee that Bankrupt Has Not Obeyed Order of Referee.

[*Caption.*]

B. M., being first duly sworn says on oath that he is the duly appointed trustee herein, and that the said bankrupt has not in any way complied with the order of the referee herein heretofore made, requiring said bankrupt to pay to the trustee the sum of $—— and —— United States Government bonds, three per cent. face value of $——, that he has not paid said sum or any part thereof to the said trustee.

Affiant further says not.

B. M.,

Sworn to and subscribed before me this —— day of —— 19—. T. H.,

[*Seal.*]

Notary Public,
—— County, ——.

No. 117.

Rule to Show Cause Against Bankrupt for Contempt.

[*Caption.*]

On motion of creditors herein, a rule is allowed to issue herein directing A. B., the bankrupt, to appear before this court at ——, —— County, ——, on the —— day of —— 19—, at —— o'clock, a. m., and show cause why an attachment for contempt should not issue against him for disobedience of the order of A. M., refere herein, and which order reads as follows:

First. That the said bankrupt A. B., within twenty days from and after the service of a copy of this order upon him pay over to B. M., Esq., trustee, the sum of $—— and deliver to said trustee United States three per cent. coupon bonds, face value of $——, or $—— in money.

Second. That in the event of said bankrupt A. B., failing or neglecting to obey this order to pay the said trustee the above amounts, and deliver said bonds or money, the said B. M., Esq., as such trustee, is hereby ordered and directed to institute proceedings against the above named A. B., in accordance with the provisions of Section 29 of the bankruptcy act of 1898.

Third. And it is further ordered that a copy of this order be served personally upon the said A. B., the said bankrupt, and by mail upon R X., Esq., attorney for the bankrupt, and on B. M., Esq., said trustee.

The United States of America
—— District of —— ss.
—— Division.

I, B. R., clerk of the District Court of the United States of America, within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of ——, this —— day of —— A. D., 19—.

[*Seal.*]

B. R., Clerk.

No. 118.

Answer of Bankrupt to Rule to Show Cause for Contempt.

[*Caption.*]

Now comes A. B., and in obedience to the rule issued by this court, says that the attachment for contempt ought not to issue against him for disobedience of the order of A. M., referee, for the following reasons:

First. He says that he can not comply with the order of this court, because he has not the bonds ordered turned over or sum of money ordered by said A. M. to be paid to him.

Second. That said order of said referee is not a lawful order within the contemplation of the bankruptcy act, or such an order, the disobedience of which would be punishable by attachment for contempt, and said order is not an order of this court.

Third. Said order is in effect a judgment directing the payment of money, and is not enforceable by proceedings in contempt.

Fourth. Section 29 of the bankruptcy act provides that such offenses, as those charged by the referee in his finding, shall be punishable only in the manner prescribed therein, to wit, by information or indictment.

Wherefore, said A. B. prays the court that said rule may be dismissed, and that he may be discharged.

X. & X.,
Attorneys for Bankrupt.

State of ——,
—— County ss.

A. B., being first duly sworn, says that the allegations contained in his foregoing answer are true. A. B.,

Sworn to and subscribed before me this —— day of —— A. D., 19—. T. H.,

Fees —— cents. Notary Public,
—— County, ——.

[*Seal.*]

No. 119.

Order to Take Additional Evidence on Rule to Show Cause.

[*Caption.*]

This cause coming on to be heard on the rule issued on the bankrupt and his answer, and on the findings and order of the referee filed herein, it appearing to the court that on this hearing the said bankrupt desires to offer additional testimony of F. H., O. H. and F. K., it is ordered that the referee take

said additional testimony, together with such evidence as the creditors of said bankrupt may offer in rebuttal, and that the referee report said evidence, together with whatever, if any, modification he may decide ought to be made of his former report and order [*filed herein*] upon consideration of the whole evidence taken before him in this matter. It is ordered that this entry be made as of the —— day of ——, 19—.

No. 120.

Order Finding that Bankrupt has Concealed Assets (1).

[*Caption.*]

This cause coming on to be heard upon the motion filed herein on the —— day of —— 19—, for an order of the court requiring the said bankrupt, A. B., to show cause why he should not be attached for contempt for disobedience of the order of A. M., Esq., the referee herein, and upon the answer of said A. B., thereto, and upon the evidence, and was argued by counsel representing creditors of said bankrupt and by counsel representing said bankrupt; and on consideration whereof the court finds upon the evidence that said bankrupt does conceal, and has in his possession the sum of $—— in money, and the further sum of $—— face value United States bonds for money in said amount, all of which he refuses to deliver to said B. M., trustee appointed herein, in accordance with the order of said referee to that effect, and which order has been served upon said bankrupt more than twenty (20) days before said —— day of ——, 19—, that the said sums constitute property belonging to the estate of said bankrupt, and the court doth to said extent confirm said finding and order of said referee, and doth approve of the referee's order made on said A. B., on the —— day of ——, 19—; and the court does further find that said A. B. has not obeyed the said order of the referee to the extent of the

amounts here found to be in his possession, and that he is thereby guilty of contempt.

It is therefore ordered that said A. B., on or before the —— day of ——, 19—, pay to said B. M., trustee, the sum of $——, and also deliver to him United States bonds face value of $——, or in lieu thereof money in the sum of $—— in money, and that he appear for further orders and proceedings herein in this court at —— o'clock a. m., on the —— day of ——, 19—.

It is ordered that for his appearance in court on the —— day of ——, 19—, at —— o'clock a. m., to abide the further orders of this court in these proceedings, said A. B. execute bond in the sum of $—— in the form, and with good and sufficient surety, as provided by law, to be approved of by the clerk of this court, and in default thereof he be committed to the custody of the marshal, and by him committed to the —— County Jail.

And said bankrupt by his attorney objects to said finding of said court and gives notice of his intention to appeal therefrom.

(1) This order must be made by the judge and not by the referee.

No. 121.

Order Committing Bankrupt for Contempt in Not Obeying Order to Pay Over Assets (1).

[*Caption.*]

Now comes the said A. B., in accordance with his undertaking heretofore made in compliance with the order heretofore made on the —— day of ——, 19—, and it appearing from the report of B. M., trustee, and from the evidence, that said A. B. has wholly refused and neglected to perform and comply with the order of court made the —— day of ——, 19— and has wholly failed to pay and deliver said moneys and bonds or any of them to said trustee, the court

do find that he has been and is guilty of contempt. It is thereupon ordered and adjudged that he, said A. B., be confined in the county jail of the county of ——, State of ——, until he comply with said order and make said payment and deliveries as directed in said order of the —— day of ——, 19—, and that a warrant issue for such commitment.

(1) This order must be made by the judge and not by the referee.

No. 122.

Order of Referee Recommending Commitment for Contempt.

In the District Court of the United States

For the —— District of ——. In Bankruptcy.

In the matter of A. B. Co., *et al.*
vs.
E. B.,
Bankrupt.

Report of Referee.

I, J. S., one of the referees in bankruptcy of this court, do respectfully report that on the —— day of ——, I entered an order requiring F. B., to pay to E. M., Trustee in Bankruptcy in this cause, on or before 9:30 o'clock a. m., ——, the sum of $—— which came to his hands as bailee or agent of the bankrupt, E. B., which sum said F. B. has not accounted for.

At the time of the entry of said order said F. B., was before me in person and by counsel, R. X., Esq. A copy of said order is filed herewith and made part hereof, marked No. 1.

I further certify that said F. B. has failed to comply with said order in whole or in part.

I therefore find that said F. B. is in contempt of court, and therefore recommend that he be punished for contempt and committed to prison until he shall have paid to the said trustee the said sum of $——.

All of which is respectfully submitted. J. S.,
Referee in Bankruptcy.

No. 123.

Order Committing Agent of Bankrupt for Contempt in Not Obeying Order of Referee to Pay Over Assets of Bankrupt.

In the District Court of the United States
For the —— District of ——.
[*Caption.*]

This cause coming on to be heard on the petition of W. T. for a review of the order of court entered herein by J. S., one of the referees of this court, requiring W. T. to pay over to E. M., Trustee in Bankruptcy of the bankrupt herein, and the certification of said referee as to the disobedience of said W. T. of said order and the recommendation of said referee that said W. T. be punished for his contempt of the order of this court, and the court being fully advised, it is hereby ordered that the said W. T., be committed for contempt of court as charged and confined in the jail of —— County until further order of this court.

No. 124.

Commitment for Contempt.

In the District Court of the United States
For the —— District of ——.
—— Division.

In re A. B., Bankrupt.	No. —— In Bankruptcy.

The defendant A. B., —— having been adjudged guilty for contempt of court in failing to pay and deliver moneys and bonds or any of them to the trustee herein ——

Thereupon the court pronounced the following sentence, to wit: That the said A. B. be imprisoned in the jail of ——

County, State of —— until he comply with the order of the —— day of ——, 19—, and make said payments and deliveries as directed in said order.

This, therefore, is to commend the marshal of said district to take the body of the said A. B. and commit the same to the said jail of —— County, —— pursuant to the above sentence.

Witness, the Honorable G. R., Judge of the District Court of the United States, this —— day of ——, A. D., 19—, and in the —— year of the Independence of the United States of America.

[*Seal.*] B. R.,
Clerk of the District Court of the United States —— District of ——.

No. 125.

Order Purging A. B. of Contempt and Directing His Release from Jail (1).

[*Caption.*]

It appearing that the order herein made against the bankrupt A. B., and after failure to comply therewith is imprisoned in the jail of —— County, in the State of ——, has now been complied with, it is hereby ordered that said A. B. is purged of contempt for his disobedience to the order of court.

It is ordered that said A. B., upon payment of costs taxed at $——, be now released and discharged from said imprisonment, and the marshal is hereby ordered to deliver a copy of this order to the sheriff of —— County, in the State of ——, who is hereby directed upon receipt thereof to release the said A. B. from his custody.

(1) This order must be made by the judge and not by the referee.

No. 126.

Rule to Show Cause Why Assignee for Creditors Should Not Pay Over Funds to Trustee in Bankruptcy (1).

[*Caption.*]

The President of the United States of America to L. C., assignee for the benefit of the creditors of A. B.:

You are hereby cited and admonished to be and appear before the District Court of the United States within and for the —— District of —— on the —— day of —— A. D., —— at 10 o'clock a. m., to show cause, if any you know or have, why you should not pay over and deliver to J. R., Trustee in Bankruptcy, the funds and assets of the estate of the said A. B. now in your possession or under your control. It is hereby ordered that the marshal of this district make legal service and return of this rule on or before the appearance day above named.

Witness, the Honorable G. R., United States District Judge for the —— District of ——, this —— day of ——, A. D., 19—, and in the —— year of the independence of the United States of America.

B. R.

Clerk of the District Court of the United States for the —— District of ——.

(1) This form can be used for the purpose of compelling the bankrupt or agent to pay over money. See Mueller *vs.* Nugent, 184 U. S. 1.

No. 127.

Order that the Assignee for the Benefit of Creditors Pay Over Funds to the Trustee in Bankruptcy.[1]

[*Caption.*]

This cause came on to be heard upon rule to show cause, etc., and was argued by counsel.

On consideration whereof it is hereby ordered that L. C., assignee for the benefit of the creditors of A. B., forthwith

pay over and deliver to J. R., Trustee in Bankruptcy of the estate of said A. B., all funds and assets of every description belonging to the estate of said A. B. now in his possession or subject to his control.

(1) See note to No. 126.

No. 128.

Order for Assignee for Creditors to Account.

In the District Court of the United States
For the —— District of ——.

A. B., *et al.*
vs.
C. D. & Co., } Bankrupt.

At ——, in said district, on the —— day of ——, A. D., 19—, before J. B., Referee in Bankruptcy.

Notice having been given, and no adverse interest appearing, it is hereby ordered that L. C., assignee for the benefit of the creditors of C. D. & Co., file with J. B., one of the referees of this court in bankruptcy, at his office, Rooms 1001-1005, Columbia Building, ——, on or before ——, at 9:30 o'clock a.m., a detailed and itemized statement showing all the receipts and disbursements made by him of money and other assets belonging to the estates of C. D. & Co., together with all vouchers that he may have for any disbursements.

It is further ordered that said L. C. be and appear before the referee aforesaid in person on ——, at 9:30 o'clock a. m., for the purpose of making settlement of his accounts as assignee of the parties aforesaid.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D., ——.

[*Seal.*]

B. R.,
Clerk of Said Court.

No. 129.

Response of an Assignee for Benefit of Creditors to a Rule to Pay Over Money. (1).

In the District Court of the United States
For the —— District of ——.

In the matter of
A. B. & Co., *et al.*,
vs.
C. D. & Co., D. G. and C. D. } Bankrupts.

L. C. for response to the order herein to show cause why he shall not pay the Receiver in Bankruptcy herein the sum of $—— shown in his report as having been paid Messrs. M. A., D. A. & J. G., and $—— to Z. P. Esq., says that said sums were paid them respectively for services rendered him as his counsel whilst acting as assignee before any proceedings herein, as already appears in his report herein. He says further that he has no money or property or means of any kind with which to pay said money or any part thereof.

He respectfully submits to the court that he ought not to be compelled to pay said money herein.

This respondent says further that long before the petition in this proceeding was filed and before he had any knowledge, information or intimation that it was intended to be filed, and relying upon it that he would be permitted to wind up his trust under the deed of assignment for the bankrupts shown in the record in this action or proceeding, he filed his petition and brought action in the State court as appears in this record, which is still pending, and he is still subject to the jurisdiction and orders of said State court requiring him to settle his accounts there and to be responsible there for all his acts and doings under said deed of assignment.

He submits to this honorable court that this response be held sufficient and that the "show cause" order herein should be an-

nulled or suspended until he is relieved from his present embarrassing position. L. C.,

Subscribed and sworn to before me by L. C., June ——. My commission expires ——. A. S.,

Notary Public, —— County, ——.

(1) Taken from the record in Louisville Trust Co. *vs.* Cominger, 184 U. S. 18.

As to the right of attorneys for assignee in state court to pay for services rendered prior to bankruptcy, see Randolph *vs.* Scrugge, trustee, 190 U. S. 533; 10 Am. B. R. 1.

No. 130.

Petition by a Trustee to Review an Order Allowing a Claim (1).

In the District Court of the United States
For the —— District of ——.

In the matter of the estate of
A. B.,
Bankrupt.
} In Bankruptcy.

The petition of N. J. M., trustee of A. B., bankrupt, of the village of ——, respectfully represents:

First. That heretofore, to wit, on the —— day of ——, the said A. B., who before that time had been engaged in business at ——, was duly adjudged a bankrupt by an order of this court, and that afterwards your petitioner was chosen and elected trustee in the estate of A. B. and is now and has for some time past been acting as such trustee.

Second. That heretofore, to wit, on the —— day of ——, the S. T. Company, of ——, a corporation organized under the laws of the State of —— and carrying on business under the laws of the State of —— at ——, aforesaid, filed its claim against said estate for —— dollars and —— cents as a preferred claim against said estate for the amount claimed to be due under and by virtue of a certain chattel mortgage made

and executed by the said A. B. to said The S. T. Company, on the —— day of ——, and which said chattel mortgage it was claimed by said, The S. T. Company, was a lien upon the stock of goods, wares and merchandise received by the said trustee and by him converted into cash.

Third. That said, The S. T. Company, petitioned A. M., Esq., referee, in matter of said estate, that said claim be allowed as a preferred claim and that the said trustee should be ordered by the court to pay the same out of the assets of said estate in preference to other claims as a first lien thereon, and that your petitioner as trustee as aforesaid, on the —— day of ——, filed his objections to the allowance of said claim, and afterwards the said matter came on to be heard before A. M., Esq., referee in said estate, and testimony was taken thereon before the said referee and by deposition and the matter submitted to him, and afterwards, on, to wit, the —— day of ——, the said referee made an order allowing the said claim of said The S. T. Company, against the estate of said A. B. to the amount of —— dollars and —— cents, together with costs amounting to —— dollars and —— cents as a preferred claim against the said estate, and ordering and requiring your petitioner as such trustee to pay said amount to said The S. T. Company, out of the moneys in his hands belonging to said estate.

Fourth. That your petitioner claims that the said chattel mortgage upon which said claim is based is void, and that said, The S. T. Company, is not entitled to enforce the same against the property purported to be covered thereby, and against the assets of said estate, and that such mortgage is illegal, fraudulent and void for the specific reasons set forth in his objections filed with said referee to the claim of said, The S. T. Company, to which he hereby makes reference.

Fifth. Your petitioner, therefore, avers that the ruling and decision of the said referee allowing said claim was error, and that no order should have been made by said referee allowing

said claim, and said referee should have made an order disallowing said claim, and holding said chattel mortgage void for the reasons set forth in the petitioner's objection thereto.

Sixth. That your petitioner desires a review by the Judge of this court of the order made by said referee, and filed this petition therefor; and he therefore prays that the error complained of and the questions of law and fact raised before the said referee and decided by him may be certified by the said referee to the Hon. G. R., District Judge; that he may review the order heretofore made and make and enter an order or direct the referee to make and enter an order holding and deciding the said chattel motgage to be illegal, fraudulent and void and that the same constituted no lien upon the property of said A. B. purporting to be covered thereby, and no lien against the assets in said estate in the hands of your petitioner, and disallowing said claim of said The S. T. Company.

And your petitioner ever prays. J. M.,
R. X., Trustee.
Attorney for Petitioner.

United States of America, —— District of ——, Division, County of ——, ss.:

I, J. M., the petitioner mentioned and described in the foregoing petition, do hereby make a solemn oath that the statements therein are true according to the best of my knowledge, information and belief. J. M.,
Petitioner.

Subscribed and sworn to before me this —— day of ——, A. D., ——. J. N.,
Notary Public, —— County, ——.

(1) The action of the referee is always subject to review by the judge of the court of bankruptcy. Gen. Ord. 27, B. A. 1898, sec. 38*a*. In any proceeding before a referee, a party dissatisfied with any order of the referee made in the course of such proceeding, may take the opinion of the judge in respect to such matter. The practice is provided for by General Order 27, and should be followed. *In re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440.

After the referee has made the order sought to be reviewed (*in re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 506; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791) and not before (*in re* Smith 93 Fed. Rep. 791), the party dissatisfied must file with the referee a petition that the order be reviewed by the judge in which must be set out the error complained of. *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 506; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791.

The limitation of ten days in which appeals must be taken to the Circuit Court of Appeals from the District Court has no application, but the petition for review must be filed within a reasonable time, which may be fixed by the local rule of court. (As to such petitions to C. C. A. which appear to be analagous see *in re* N. Y. Economical Printing Co. (C. C. A., 2nd Cir.), 106 Fed. Rep. 839, 5 Am. B. R. 697, 3 N. B. N. 539).

The district judge may refuse to act without such petition and should not consider exceptions not therein contained. *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566; *in re* Scott, 99 Fed. Rep. 404, 3 Am. B. R. 625, 2 N. B. N. 440; *in re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704; *in re* Smith, 93 Fed. Rep. 791. The referee must forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon. Gen. Ord. 27. The certificate will be signed by the referee and transmitted by him to the judge. B. A. 1898, sec. 39*a*, clauses 5 and 9.

The "summary of the evidence" mentioned in the order may be the evidence taken stenographically, or the substance thereof as agreed upon by the parties. B. A. 1898, sec. 39*a*, clauses 5 and 9. A summary and not the complete evidence should be certified wherever the rules of justice will permit. Cunningham *vs.* German Nat. Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 932. Where this is done the district court may require the original evidence or parts thereof certified to it. Cunningham *vs.* German Nat. Bank (C. C. A., 6th Cir.), 103 Fed. Rep. 932.

If the question be improperly certified the court may refuse to give an opinion. *In re* Smith, 93 Fed. Rep. 791. If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him. *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641, or refer the cause to the referee for further proofs. He will not set aside the findings of fact of a referee unless the same are manifestly contrary to the weight of the evidence. *In re* Covington, 6 Am. B. R. 374. But when a referee finds that a bankrupt has property in his possession or control which he conceals from the trustee, and such finding is made the basis of an order of delivery, which is enforceable by imprisonment for contempt in disobeying it, then the judge in reviewing the finding must be satisfied that the evidence establishes the fact beyond

a reasonable doubt. *In re* Mayer, 98 Fed. Rep. 839, 3 Am. B. R. 533; *in re* McCormick, 97 Fed. Rep. 566, 3 Am. B. R. 340, 2 N. B. N. 104.

The judge will probably hear arguments of counsel on the point, and will give his opinion on the point. If the order of the referee is modified or reversed he may direct the proper order to be entered on the journal of the court.

No. 131.

Petition by an Assignee to Review an Order of a Referee on a Rule to Pay Over Money to Receiver in Bankruptcy (1).

In the District Court of the United States
For the —— District of ——.

In the matter of A. B. & Co., &c., *vs.* C. D. & Co., D. G. and C. D. Bankrupts.	In Bankruptcy.

Respectfully represents the petitioner, L. C., that during the course of the proceedings herein, before J. B., one of the Referees in Bankruptcy of this court, a rule was issued against the petitioner to show cause why he should not be compelled to pay to the receiver the sum of $——; also another rule was issued against the petitioner to show cause why he should not pay the further sum of $—— by him paid to M. A., D. A. & J. G., for services as counsel for him in his capacity as assignee under the general assignment under the State law; that your petitioner filed responses to both of said rules which responses having come on to be heard were adjudged by the said referee insufficient and said rules were made absolute. Your petitioner shows that said referee erred to his prejudice in issuing both of said rules, also in adjudging both of said responses insufficient, also in making both of said rules absolute.

Wherefore, your petitioner prays that the orders of said

referee above set forth may be reviewed by the Honorable Judge of this court.

L. C.,
By his Counsel, X. & X.

[*Verification.*]

(1) As to power of court to review orders of referees and the practice in such cases, see Gen. Ord. 27; Mueller *vs.* Nugent, 184 U. S. 1; Cunningham *vs.* Bank, 103 Fed. Rep. 932; Courier Journal Job Printing Co. *vs.* Brewing Co., 101 Fed. Rep. 699; Loveland Bank., sec. 32*a*.

See also note to No. 130.

No. 132.

Petition to Review Order of Referee Disallowing Claim (1).

[*Caption.*]

To the Honorable A. C., Judge of the District Court of the United States for the —— District of ——.

The Petition of The D. M. Grocery Company, a corporation under the laws of ——, one of the creditors of said bankrupt, respectfully represents that on the —— day of —— 1901, manifest error to the prejudice of complainant, was made by the referee in said matter in a finding and order disallowing and expunging the claim of said corporation against said bankrupt from the list of allowed claims upon the trustee's record in said case; and in ordering said corporation to pay as preferences received from said bankrupt the sum of $——. The errors complained of are:

First. That the evidence adduced before said referee and set out in the agreed statement herewith submitted, shows that no preference in excess of subsequent credits given, were received by said corporation.

Second. Said referee erred in the method adopted for calculating preferences claimed to be within four months of bankruptcy in said case.

Third. Said referee erred in finding from the evidence that the dates of payment on the open account of said bankrupt with said corporation, were those dates shown by the books

of the bankers of said bankrupt, Messrs. R., B. & Company.

Fourth. Said referee erred in finding that any payments made to said corporation by said bankrupt were preferences for any amount.

Fifth. Said referee erred in ordering said corporation to pay the sum of $——, or any sum at all, within five days from said date.

Sixth. Said referee erred in his conclusions of law from the evidence offered at said hearing.

Wherefore the D. M. Grocery Company prays that it may be decreed by the court to have its claim against the said bankrupt estate allowed for the full amount thereof, and that it be restored to all things lost by reason of the finding and order of the referee in said matter.

The D. M. Grocery Company,
By R. X.,
Its Attorney.

[*Verification.*]

(1) See note to No. 130.

No. 133.

Petition to Review Order of Referee to Pay to Trustee Money of Bankrupt (1).

The District Court of the United States for the —— District of ——. In Bankruptcy.

In re
A. B. & Co. *et al.*
vs.
E. T.
} Petition for Review.

Comes W. T., by counsel, and files herewith his petition for review of the order of the referee entered herein on ——, and says that said referee erred in ordering and adjudging as insufficient his response to the rule filed herein on ——; that said referee erred in adjudging that there came to the hands

of said W. T. as the agent of the bankrupt, on ——, the sum of $——, being the net proceeds realized from the mortgage executed by the bankrupt upon his house and lot in the City of ——; that said referee erred in adjudging that there came to the hands of said W. T., as the agent of the bankrupt on ——, the further sum of $——, being the net proceeds from the sale of the merchandise sold to H. S.; that said referee erred in adjudging that said sums are the property of the bankrupt E. T., and belong to E. M., trustee in bankruptcy herein of said estate; that said referee erred in ordering that said rule be made absolute to the amount of said two sums aggregating the sum of $——; that said referee erred in ordering and requiring said W. T. to pay to E. M., trustee in bankruptcy in this cause on or before 9:30 o'clock on ——, the said aggregate sum of $——, and said referee erred in entering said order on ——, a copy of which is filed herewith, that said order is erroneous and void, and said referee had no jurisdiction to enter same.

Wherefore, said W. T. prays that said order entered herein by the referee on ——, be reviewed by the Honorable Judge of the District Court of the United States for the —— District of ——, and that said order be adjudged erroneous and void.

X. & X.,
Attorneys for W. T.

(1) Taken from the record in Mueller *vs.* Nugent, 184 U. S. 1. See note to No. 130.

No. 134.

Petition for Review Order on Claims (1).

[*Caption.*]

And now comes the L. Trust Company, trustee in bankruptcy, of the bankrupts in the above styled proceeding, by R. Y., Esq., of counsel, and respectfully represents to the court that said trustee and the lawful creditors of the estate of said bankrupts whom said trustee represents, are aggrieved by the find-

ing of the Hon. A. M., referee herein, with reference to the following matters, to wit:

That the referee in his finding and decision, upon the exceptions of said trustee and of the creditors to the claim of D. L. & Son, erred to the prejudice of these petitioners, the said trustee and the lawful creditors of said bankrupts.

First. In not finding that the sum of $—— had been paid to said D. L. & Son on their claim filed here, by E. F. & Co., endorsers of two $—— notes included in and part of said claim of D. L. & Son.

Second. In not finding that said claim of D. L. & Son had been paid in full, as a preferential payment, out of the proceeds of the fraudulent sale of the remainder of the stock, fixtures, etc., of the bankrupt firm, to E. F. of said firm of E. F. & Co., as provided for in the written agreement between the three members of the bankrupt firm, read in evidence, and in finding that said preferential payment was only one-half of said claim of D. L. & Son, when in fact said claim was paid in full.

Third. In finding that only one-half of the claim of E. F. & Co. was paid as a preferential payment out of the profits of said fraudulent sale to E. F., when in fact said claim was paid in full as shown conclusively by the evidence in said proceeding.

Fourth. Because said referee erred in not disallowing each of said claims of D. L. & Son and E. F. & Co.

Wherefore said petitioners pray this honorable court to review the findings of the said receiver with reference to the matters hereinbefore set forth, and that the referee herein certify the said questions to the court for that purpose and that he send up with said certificate all of the testimony taken on said issues of said bankrupts' estate, etc.

The L. Trust Company,
Trustee in Bankruptcy.
R. Y.,
Attorney.

(1) See note to No. 130.

No. 135.

Petition to Review Order Relative to Exemptions (1).

[*Caption.*]

Now comes E. B. and petitions to the Honorable A. M., Referee, for any order certifying to the Honorable G. R., Judge of the District Court of the United States for the —— District of ——, for review of all matters pertaining in and to the order entered herein on the —— day of ——, A. D. ——, relating to and finding against the claims of said E. B., as widow of said A. B., bankrupt, and respectfully represents that the errors complained of are as follows:

The court erred in not making an order, under Section 8 of the Bankruptcy Act:

First. That the trustee paid to said E. B. the exemptions heretofore demanded by her husband during his lifetime.

Second. That the trustee permit her to remain in her husband's mansion house and in possession of his household property for a period of one year, unless dower is sooner assigned her in said mansion house.

Third. That the trustee pay to her from the assets of said estate the allowance provided for her under Sections 6040 and 6041 of the Revised Statutes of ——, and heretofore fixed by the Probate Court of —— County, ——, at $——.

Fourth. That said trustee permit her to retain as exempt such part of the assets of said estate as are exempt under Section 6038 of the Revised Statutes of ——.

Fifth. That said trustee allow and pay to her such other exemptions as she is entitled to receive under the Revised Statutes of ——.

E. B.,
By R. Y., her Attorney.

(1) See note to No. 130.

No. 136.

Certificate by Referee to Judge (1).

(Official Form No. 56.)

In the District Court of the United States for the —— District of ——.

——— ——— ———
In the matter of
——— ——— ———
Bankrupt.
——— ——— ———
} In Bankruptcy.

I, ——, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. 18—.

———,
Referee in Bankruptcy.

(1) See note to No. 130.

No. 137.

Certificate of Referee to Judge (1).

At ——, in said district, on the —— day of ——, A. D. ——, before A. M., Referee in Bankruptcy.

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The Third National Bank, of ——, filed a claim evidenced

by one promissory note for $—— and also another promissory note for $——, and asserted a claim to be subrogated to the rights of the mortgagees under three mortgages, to wit, one dated April 15th, 1892, another dated February 19th, 1894, and another dated January 12th, 1897. Prior to the execution of any of said mortgages the bankrupt had also executed to the S. Trust Company a mortgage to secure an issue of $—— of bonds, of which $—— were negotiated and have ever since remained outstanding. Under the provisions of the charter of the bankrupt I find that said bankrupt was limited in its power to execute a mortgage to the extent of $——. I also find that the Third National Bank, through its managing officer, E. C., cashier before making any of said loans had knowledge of the existence of said mortgage to the S. Trust Company, though it is testified by E. C., and not denied, that about the time the Third National Bank made its loans he was informed that the said mortgage to the S. Trust Company was for $——. As a matter of law I find that the information which said E. C. had of the existence of said mortgage was sufficient to put him upon inquiry as to the amount thereof.

I further find that the notes of $—— and $—— filed by said Third National Bank are renewals of various loans made by said Third National Bank to the bankrupt, beginning April 16th, 1892.

The mortgage to the S. Trust Company outstanding amounted to $49,000, and I have allowed a lien to the Third National Bank by way of subrogation to the rights of the mortgagees in the three mortgages dated April 15th, 1892, February 19th, 1894, and January 12th, 1897, to the extent of $——, making together the sum of $——, the limit prescribed by the charter of the bankrupt. The balance of the claim of the Third National Bank, to wit, $——, I have allowed as a general claim.

The Third National Bank has filed a petition for review of the foregoing ruling.

And the said question is certified to the Judge for his opinion thereon.

Dated at —— the —— day of ——, A. D. ——.

A. M.,
Referee in Bankruptcy.

I herewith transmit the testimony pertaining to the claim of said Third National Bank; also the proof of claim of said bank with the mortgages relied on by it attached thereto, and also a memorandum of the reasons for my finding.

A. M.,
Referee.

(1) See note to No. 130.

No. 138.

Certificate of Referee to Judge on Allowance of Claim (1).

[*Caption.*]

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the question came up as to the allowance of the claim of the S. Trust Company, a corporation organized under the laws of the state of —— as a preferred claim against said estate, which said claim has been allowed, and that on account of the allowance thereof a petition to the court has been made on behalf of the trustee asking for a review of the order of said allowance and the question of the allowance of said claim is certified to the Judge for his opinion thereon.

I return herewith as the record the following items:

First. Proof of claim of S. Trust Company filed ——.

Second. Objections as to the allowance of said claim made on behalf of the trustee, filed ——.

Third. A further itemized statement of said claim, filed ——.

Fourth. Depositions taken in favor of said claim, filed ——.

Fifth. Depositions of E. F. in behalf of said claim.

Sixth. Testimony introduced on the part of the estate in said claim.

I also return herewith an order made in respect to said claim and the petition for a review of said order, all being made a part thereof.

Dated at —— the —— day of ——.

A. M.,
Referee.

(1) See note to No. 130.

No. 139.

Certificate of Referee to Judge on Denying Lien on Realty (1).

[*Caption.*]

I, A. M., one of the Referees in Bankruptcy of said court, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to said proceedings:

The First National Bank of —— filed a note for $—— claiming a lien upon the plant and realty of the bankrupt by way of subrogation to the rights of A. S., under two mortgages, dated April 15th, 1892, and February 19th, 1894, executed by the bankrupt to said A. S., and others.

I found that said bank is not entitled to the lien claimed, and a petition for review has this day been filed. In the order complained of I also passed upon claims of E. F. and Third National Bank. A petition for review has heretofore been filed by the Third National Bank, and the mortgages in question have been sent to the court with my reasons for the whole order.

And the said question raised by the First National Bank is also certified to the Judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. ——.

A. M.,
Referee in Bankruptcy.

(1) See note to No. 130.

No. 140.
Certificate of Referee on Finding Creditor Held a Preference (1).

[*Caption.*]

I, A. M., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause, before me the following questions arose pertinent to the said proceedings:

E. F. & Co. filed before me proof of debt for $——, and also another claim verified by the assignee of E. F. & Co. for $——.

D. L. & Son filed a claim for $——, and another claim for $——, which includes and is a duplication of said claim of $——.

The trustee, R. B., and S. G., filed exceptions to said claims, averring that the holders thereof had received preferences.

I found that E. F. & Co. and D. L. & Son had received preferences to the amount of fifty per cent. of their claims and ordered that they elect whether or not they will surrender the preferences received by them or have the claims filed as aforesaid disallowed. To that order and finding said E. F. & Co. and D. L. & Son have filed petitions for review, and the trustee also filed a petition for review.

Said claims, also the exceptions aforesaid, also the order and finding thereon, also said three petitions for review, are all filed herewith and made part hereof, marked exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9.

A summary of the evidence taken before me and relating to the question involved is also attached hereto and marked exhibit "Summary of Evidence." An opinion giving my reasons for the finding and order aforesaid is also made part of this certificate, marked exhibit "Opinion of Referee."

And the said questions are certified to the Judge for his opinion thereon.

Dated at ——, this —— day of ——, A. D. ——.

A. M., Referee in Bankruptcy.

(1) See note to No. 130.

No. 141.

Motion to Correct Journal Entry.

Now comes the C. D. Company, a creditor of said bankrupt, and respectfully represents that in the matter heard by the court on the 14th day of February, 1902, on certification from the referee disallowing and expunging the claim of said creditor, the written finding and order of the court in said proceedings was filed in said court and made part of its records on the 6th day of March, 1902, at 8 o'clock a. m.; that a journal entry thereof was filed by said referee in said court on the 28th day of March, 1902, and by the clerk was made part of the records as of said date, to wit; March 28, 1902.

Wherefore, said creditor prays the court for an order correcting the record in said matter, and directing the clerk to make the record of said entry as of the date March 6th instead of the date March 28th, 1902.

The C. D. Company,
By R. Y., Its Attorney

No. 142.

Order Confirming Order of Referee.

In the District Court of the United States
For the —— District of ——.
A. B.,
vs.
C. D. & Co.,

This cause coming on to be heard on the petition of L. C., for review of the order of court entered herein by J. B., one of the referees of this court, requiring L. C. to pay over to the E. F. Trust Company, Trustee in Bankruptcy herein, the sums of $—— and $—— and the court being fully advised, delivered a written opinion which was filed herein, and on —— day of ——, and in pursuance of said written opinion, it is considered ordered and decreed by the court that said order of the

referee is hereby confirmed and the petition for review filed by said L. C. on the —— day of —— is dismissed and it is for this adjudged, ordered and decreed by the court that said L. C. pay to said E. F. Trust Company, trustee, the said sums of $—— and $—— on or before —— day of ——.

No. 143.

Order Reversing Order of Referee Disallowing Claim

In the District Court of the United States
For the —— District of ——.

In the matter of F. H., doing business as F. H. & Son, Bankrupt —— Division.	No. —— In Bankruptcy.

This day this cause came on for hearing on the petition of The D. M. Grocery Company for review of the decision of the Referee in Bankruptcy disallowing and expunging the claim of said The D. M. Grocery Company, the certificate of the referee as to the questions presented and summary of the evidence relating thereto, and the finding and order of the referee thereon, was argued by counsel and submitted to the court and on consideration thereof the court find that the decision of the referee in refusing to allow and in expunging the claim of said The D. M. Grocery Company was erroneous, and claim of said The D. M. Grocery Company, should have been allowed, as proved by it, as a valid claim in the sum of —— dollars. It is, therefore, ordered, adjudged and decreed that the action of the Referee in Bankruptcy in disallowing said claim be and the same is hereby reversed and this proceeding is hereby remanded with directions to the referee to allow the claim of said The D. M. Grocery Company, in the sum of —— ($——) dollars, to which finding, order, judgment and decree, B. F., Trustee in Bankruptcy of F. H., doing business as F. H.

& Son, at the time excepted, and gave notice of his intention to appeal this matter to the Circuit Court of Appeals for the —— Circuit.

No. 144.

Decree Confirming Order of Referee with Reference to Election of Trustee

[*Caption*

This matter came on to be heard upon the petition to review the findings and decision of the referee in the matter of the election of a trustee; upon consideration whereof, the court approves and confirms the findings of the referee in said behalf.

No. 145.

Order Marshalling Liens.

[*Caption.*]

This day this cause coming on to be heard upon the petitions for review filed herein by the Third National Bank, the First National Bank and E. F., asking a review of the orders of the referee herein, upon the allowance of their respective claims as preferred, and counsel for said parties having been heard, and the court being sufficiently advised, it is therefore ordered and adjudged that the finding of the referee herein be, and the same is hereby disapproved in so far as same denied to E. F., a lien upon the property of the bankrupt for her said debt, and it is now ordered and adjudged that said E. F. has a prior lien for $—— with interest thereon from the date of adjudication herein until paid upon the property of the bankrupt described in the mortgage of March 9th, 1892, superior to the Third National Bank, but inferior to the claim of the Columbia Finance & Trust Company, trustee, for the first mortgage bondholders.

It is also ordered and adjudged that the finding of the referee upon the claim of the Third National Bank is erroneous, and

is set aside to the extent that it gave the Third National Bank a lien under and by virtue of the mortgages of April 15th, 1892, February 19th, 1894, and January 12th, 1897, for the sum of —— ($——) dollars and it is now ordered and adjudged that said Third National Bank is entitled to and has a lien under and by virtue of the mortgage of April 15th, 1892, upon the property therein described, for the sum of —— ($——) dollars with interest thereon from the —— day of ——, until paid, inferior only to that of the R. Trust Company, trustee, and E. F., and that the balance of the claim of the Third National Bank against said bankrupt, to wit, —— ($——) dollars is hereby allowed as a general or unsecured claim only against said estate.

The foregoing amounts thus allowed priority to E. F. and the Third National Bank, together with the —— ($——) dollars first mortgage debt to the R. Trust Company, trustee, will make up —— ($——) dollars and leave nothing to satisfy any preference, which might otherwise be available to the First National Bank, and it is adjudged that the claim of said First National Bank, against said bankrupt's estate be and the same is allowed for the sum of —— dollars and —— cents ($——) as a general claim against the estate of the bankrupt, and that said First National Bank has no lien to secure its said debt.

It is also ordered and adjudged by the court that the finding of the referee herein upon the limit of mortgaged indebtedness that could be incurred by said bankrupt, placing said limit at —— ($——) dollars, and that all mortgages issued above this limit of —— ($——) dollars, were and are under the law of ——, void, be and the same is now confirmed, and it is adjudged that all said mortgages in excess of —— ($——) dollars, executed by said bankrupt were and are under said law of ——, void and of no effect.

No. 146.

Decree on Petition to Review Order Relative to Widow's Exemptions.

[*Caption.*]

On this —— day of ——, A. D. ——, this cause came on to be heard on the petition of E. B., widow of the bankrupt for review of an order heretofore made on the —— day of ——, A. D. ——, by A. M., referee, on her petition before said referee for the allowance of certain exemptions under the laws of the state of ——, and due notice of said hearing having been given to all parties in interest, the court finds that said petitioner, E. B., widow of said bankrupt, is entitled to special exemptions of household goods and furniture, under section 6038 of the Revised Statutes of —— and that she is entitled to the allowances mentioned under section Nos. 6040 and 6041 of the Revised Statutes of ——, and is entitled to remain in the mansion house of her husband for the period of one year, unless dower is sooner assigned her therein.

It is therefore ordered:

First. That the trustee permit the widow, E. B., to remain in the mansion house for the period of one year, unless dower is sooner assigned to her therein.

Second. That the trustee pay to her the allowances made to her under sections 6040 and 6041 of the Revised Statutes of ——, to wit: The sum of $——, provided there shall be so much in his hands after paying costs and any mortgage to which the widow was a party, out of funds arising from the sale of mortgaged premises, or any property belonging to said estate.

Third. That the trustee permit her to retain such parts of the assets of said estate as are mentioned in Section 6038 of the Revised Statutes of ——.

Fourth. That nothing be paid or turned over to H. S., executor of the estate of A. B., on account of exemptions claimed by said A. B. in the proceedings in bankruptcy.

It is further ordered that the decision and order of A. M., referee, be and is so far overruled to the extent that it is inconsistent with the above findings of the court.

No. 147.

Ancillary Order to Pay Funds of Bankrupt to a Trustee Appointed by Another District Court (1).

[*Caption.*]

Whereas, it appears that Solis V. Peiser, trading as Peiser & Co., was adjudicated a bankrupt by the District Court of the United States for the Southern District of New York on the 9th day of November, 1901, and that Theodore M. Taft, of New York, was duly appointed receiver of said bankrupt; and

Whereas, said Theodore M. Taft has presented a petition to this court asking for its assistance in enforcing the orders of the District Court of the United States for the Southern District of New York in proceedings ancillary to the said bankruptcy, and in aid thereof:

Now therefore, this 2d day of April, A. D. 1902, on hearing of the said petition, and the answer of the Union Trust Company of Philadelphia and W. J. Clark, its Treasurer, as filed thereto, it is

Ordered and decreed that the Union Trust Company of Philadelphia do pay over, within ten days from the date hereof, to said Theodore M. Taft, receiver of Solis V. Peiser, trading as Peiser & Co., the above bankrupt, the sum of $350.93, being the amount on deposit with said the Union Trust Company to the credit of said Peiser & Co. on November 9, 1901, the date of the said adjudication in bankruptcy, together with any interest on said deposit as the same is allowed by the said trust company from said date, or show cause why said payment should not be made.

(1) This order was entered in the District Court of the United States for the Eastern District of Pennsylvania and is taken from *in re* Peiser, 115 Fed. Rep. 198.

No. 148.

Order on Rule to Show Cause Against Bankrupt to Pay Money to Trustee, Insanity of Bankrupt.

District Court of the United States,
——District of ——.

A. B. Co. &c.,
vs.
E. B.
} In Bankruptcy.

This case has been heard upon the question of the adoption of the referee's recommendation to require the bankrupt E. B. to pay to the trustee herein the sum $——, money realized from the sale of the stock of merchandise and from the mortgage described in the papers, or to punish him for contempt in case he fails to so pay, the response of said bankrupt filed thereto and the suggestion filed by counsel as to the insanity of said bankrupt, evidence having been heard by the court as to the present condition of mind of said E. B., and the court being fully advised, delivered a written opinion herein, which is ordered to be filed, and pursuant to which it is considered by the court that the said E. B. is not now in such condition of mind as to make him properly subject to an order punishing him for contempt. It is therefore ordered that said E. B. be permitted to go hence without day, but the trustee of said E. B., in bankruptcy has leave again to bring the subject to the attention of the Referee in Bankruptcy, should development or change of condition in said E. B.'s mind make it in his judgment proper.

No. 149.

Bill in Equity to Recover a Preference and for an Injunction (1).

The District Court of the United States for the —— District of ——.

W. H., Trustee in Bankruptcy of
A. B. and C. D., late partners as A. B. & Co.

vs.

E. F.

To the Honorable G. R., Judge of the District Court of the United States in and for the —— District of ——.

W. H., trustee in bankruptcy of A. B. and C. D., co-partners as A. B. & Co., brings this his bill of complaint against E. F. of ——, a citizen of the state of ——, residing at —— in said state.

Your orator complains and says that the said A. B. and C. D., co-partners, doing business at ——, in the state of ——, under the style of A. B. & Co., were by the District Court of the United States in and for the —— district of ——, adjudged bankrupts on the —— day of ——, 19—, and that this plaintiff was duly appointed trustee in bankruptcy of the said A. B. and C. D., co-partners as A. B. & Co., by the said District Court on the —— day of ——, 19—, and that he duly qualified and entered upon the performance of his duties as such trustee and is still acting as such trustee.

Your orator further says that he is informed and believes that on or about the —— day of ——, 19—, said A. B. and C. D., well knowing at the time that said firm was insolvent and unable to pay its creditors in full and with intent to prefer the defendant E. F. as a creditor of the said firm of A. B. & Co., and with the further intent to defraud the other creditors of said firm and in violation of an Act of Congress to establish a uniform system of bankruptcy in the United States, did withdraw from the funds of said firm the sum of $——

and did transfer and pay the same to the said E. F. on the day aforesaid, and that he, the said E. F., at that time had reason to believe and to know that said firm was insolvent and that said payment to him was for the purpose of preferring him as a creditor of said firm.

Your orator further complains and says that he is informed and believes that said E. F. is insolvent and has no money or property in his own right and that unless restrained from so doing, will dispose of said funds and will be unable to pay over the same to this plaintiff and that said funds will be lost to the estate of the said bankrupts.

Wherefore your orator prays the court to now grant a preliminary injunction restraining and enjoining the said E. F. from transferring, paying over or in any way disposing of all or any part of said $—— until further order of this court, and that he may be decreed to hold said funds in trust for and may be required to account for and pay over the same to this plaintiff, and for such other and further relief as may be just and proper in the premises.

May it please your honors to grant unto this plaintiff a writ of subpœna to be directed to the said E. F., thereby commanding him at a certain time and under a certain penalty personally to appear before this honorable court and then and there full, true, direct and perfect answer make [*but not under oath*] to all and singular the premises and further to stand to and perform and abide such further order, direction and decree therein as to this honorable court shall seem meet.

W. H.,
Trustee in Bankruptcy.

X. & X.,
Attorneys for Plaintiff.

[*Verification.*]

(1) The District Court is given concurrent jurisdiction with any State Court for the purpose of recovering property by the trustee under Sec. 60*b* and Sec. 67*e* of the Bankrupt Act of 1898. Act of Feb. 3, 1903, Sec. 8, amending Sec. 23 of the Bankrupt Act of 1898.

The suit in this class of cases must be plenary. Louisville Trust Co. *vs.* Comingor, 184 U. S. 18; Marshall *vs.* Knox, 16 Wall. 556. It may be either a suit at law or in equity, as the case may require.

No. 150.

Petition for Removal of Trustee (1).

(Official Form No. 52.)

In the District Court of the United States for the —— District of ——.

—— —— ——	
In the matter of	
—— —— ——	In Bankruptcy.
Bankrupt.	
—— —— ——	

To the Honorable ——.

Judge of the District Court for the —— District of ——:

The petition of ——, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ——, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*here set forth the particular cause or causes for which such removal is requested.*]

Wherefore —— pray that notice may be served upon said ——, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

(1) Gen. Order 12. Loveland's Bank., sec. 145.

No. 151.

Notice of Petition for Removal of Trustee (1).

(Official Form No. 53.)

In the District Court of the United States for the —— District of ——.

In the matter of —— —— —— Bankrupt.	In Bankruptcy.

At ——, on the —— day of ——, A. D. 19—.

To ——,

Truste of the estate of ——, bankrupt:

You are hereby notified to appear before this court, at ——, on the ——— day of ——, A. D. 18—, at —— o'clock —— m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of ——, one of the creditors of said bankrupt, filed in this court on the —— day of ——, A. D. 19—, in which it is alleged [*here insert the allegation of the petition*].

——,
Clerk.

(1) Gen. Order 13. Loveland's Bank., sec. 145.

No. 152.

Order for Removal of Trustee (1).

(Official Form No. 54.)

In the District Court of the United States for the —— District of ——.

In the matter of —— —— —— Bankrupt.	In Bankruptcy.

Whereas, ——, of ——, did, on the —— day of ——, A. D.

19—, present his petition to this court, praying that, for reasons therein set forth, ——, the trustee of the estate of said ——, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said —— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said —— be removed from the trust as trustee of the estate of said bankrupt, and the costs of the said petitioner incidental to said petition be paid by said ——, trustee [*or*, out of the estate of the said ——, subject to prior charges].

Witness the Honorable ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 19—.

——,
Clerk.

[*Seal of the court.*]

(1) Gen. Order 13. Loveland's Bank., sec. 145.

No. 153.

Bankrupt's Petition for Discharge. (1).

(Official Form No. 57.)

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

To the Honorable ——,

Judge of the District Court of the United States for the District of ——:

——, of ——, in the county of ——, and state of ——, in said district, respectfully represents that on the —— day of ——, last past, he was duly adjudged bankrupt under the

Acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ——, A. D. 19—.

——,
Bankrupt.

ORDER OF NOTICE THEREON.

District of ——, ss.

On this —— day of ——, A. D. 19—, on reading the foregoing petition, it is

Ordered by the court that a hearing be had upon the same on the —— day of ——, A. D. 19—, before said court, at ——, in said district, at —— o'clock in the ——noon; and that notice thereof be published in ——, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ——, judge of the said court, and the seal thereof, at —— in said district, on the —— day of ——, A. D. 19—.

——,
[*Seal of the court.*] Clerk.

—— hereby depose, on oath, that the foregoing order was published in the —— on the following —— days, viz.:

On the —— day of ——, and on the —— day of ——, in the year 19—.

District of ——.

——, 19—.

Personally appeared ——, and made oath that the foregoing statement by him subscribed is true.

Before me. ——,

[*Official character.*]

I hereby certify that I have on this —— day of ——, A. D. 19—, sent by mail copies of the above order, as therein directed. ——,

Clerk.

(1) As to who may file a petition for discharge, when and where the petition is filed see Loveland's Bank., secs. 273 and 274. B. A. 1898, sec. 14 Gen. Ord. 31.

The discharge should be allowed unless it is opposed by creditors and a case made out under one of the grounds specified in the statute. Strause *vs.* Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *in re* Frank, 6 Am. B. R. 156.

Where a petition for a discharge has been refused upon the merits a second petition will not be entertained in the same proceeding. *In re* Royal, 7 Am. B. R. 636. A new petition may be filed in a second bankruptcy proceeding the effect of which may be limited. *In re* Claff, 7 Am. B. R. 128.

No. 154.

Notice to Attorney for Bankrupt with Reference to Discharge.

R. X. Esq.,
Attorney at Law.

Dear Sir:—In the matter of A. B., No. —— in bankruptcy, the petition for discharge and check for $——, advanced fees received. Enclosed herewith you will find receipt for said fees, and also notice for insertion in the newspaper designated. Please see that the notice is promptly inserted in the said newspaper, and that proof thereof, with payment receipted, and the final oath are filed with the clerk before the return day. Neither the bankrupt nor his attorney need be present on the return day. The creditors are allowed ten days beyond return day in which to file specifications. If no appearance in opposi-

tion to discharge has been entered before return day or specifications filed within the ten days, the decree of discharge will be made, and certificate thereof mailed you. Please acknowledge receipt of notice for publication.

Yours Respectfully,
B. R.,
Clerk.

No. 155.

Notice of Application for Discharge in Bankruptcy.

The District Court of the United States
For the —— District of ——.
—— Division.
No. ——.
In the matter of A. B.,
Bankrupt.

Notice is hereby given that A. B., having on the —— day of —— been duly adjudged a bankrupt in the above entitled cause, has filed his petition for a discharge as a bankrupt, and the same will be heard by said court on the —— day of ——, at 10 o'clock in the forenoon, at the United States Court room in ——, at which time and place all creditors and other persons in interest may appear and show cause, if any they have, why the prayer of said petition should not be granted.

B. R.,
Clerk of Said Court.

No. 156.

Proof of Publication.

The District Court of the United States
For The —— District of ——
—— Division.

In the matter of
A. B.,
Bankrupt.
} In Bankruptcy.

State of ——.
County of ——, ss:

T. G., of said city of ——, County of ——, State of ——, being first duly sworn, deposes and says that he is the principal clerk in the office of the —— Times Co., publishers of the Times, a daily newspaper in the said city, that a notice to creditors in the above entitled bankruptcy matter, of which the annexed printed slip taken from the said newspaper is a copy, was inserted and published therein on the —— and —— days of ——, A. D. ——.

T .G.,

Subscribed and sworn to before me this —— day of —— A. D. ——.

F. C.,
Notary Public.
—— County, ——.

[*Seal.*]

No. 157.

Specification of Grounds of Opposition to Bankrupt's Discharge (1).

(Official Form No. 58.)

In the District Court of the United States for the —— District of ——.

—— —— ——
In the matter of
—— —— ——
Bankrupt.
—— —— ——
} In Bankruptcy.

——, of ——, in the county of ——, and state of ——, a

party interested in the estate of said ——, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition*]. (2)

——,
Creditor.

(1) Where creditors object to a bankrupt's discharge it is incumbent on them to enter their appearance and file specifications as to the grounds of opposition. Gen. Ord. 32, Loveland's Bank. secs. 276 to 281. *In re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 610.

The specification should be filed with the clerk and not with the judge. *In re* Sykes, 6 Am. B. R. 264.

The specifications of objection to the discharge of the bankrupt must be filed within the time prescribed by Gen. Ord. 32, and by leave of court for cause shown, or they will be dismissed. *In re* Albrecht, 104 Fed. Rep. 974; *in re* Clothier, 108 Fed. 199, 6 Am. B. R. 203.

The court may require a positive verification of the specification of objection to the bankrupt's discharge. *In re* Brown (C. C. A. 5th Cir.) 7 Am. B. R. 252, 112 Fed. Rep. 49.

The specification of objections are in the nature of a pleading. *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715. It must in order to prevent a discharge set forth one of the statutory grounds. Strause *vs.* Hooper, 105 Fed. Rep. 590, 5 Am. B. R. 225; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Thomas, 92 Fed. Rep. 912, 1 Am. B. R. 515; *in re* Frank, 6 Am. B. R. 156. The allegations must be distinct, specific and definite, so as to advise the bankrupt of the acts charged which bring him within the inhibition of the Act so far as they relate to his discharge. *In re* Hirsch, 96 Fed. Rep. 468, 2 Am. B. R. 715; *in re* Hixon, 93 Fed. Rep. 440, 1 Am. B. R. 613; *in re* Holman, 92 Fed. Rep. 512, 1 Am. B. R. 600; *in re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274; *in re* Kaiser, 99 Fed. Rep. 689, 3 Am. B. R. 767.

The sufficiency of a specification in opposition to a discharge may be attacked before a referee to whom the issue is referred. *In re* Quackenbush, 102 Fed. Rep. 282, 4 Am. B. R. 274. As to the manner of making attack, see *in re* Crispt, 9 Am. B. R. 1.

The allegations of the specification must be proved. *In re* Logan, 102 Fed. Rep. 876, 4 Am. B. R. 525. *In re* Crispt, 9 Am. B. R. 1.

A finding by a referee on the hearing of a petition for discharge in bankruptcy will not be reversed except upon clear and convincing proof of error. *In re* Covington, 6 Am. B. R. 373.

The referee has been allowed additional fees for hearing a petition on discharge. *In re* Grossman, 6 Am. B. R. 510.

Amendments to the specifications of creditors may be allowed on application to the judge and not to the referee. The allowance rests in the dis-

cretion of the judge. *In re* Kaiser, 99 Fed. Rep. 680, 3 Am. B. R. 770; *in re* Wolfensohn, 5 Am. B. R. 60; *in re* Mudd, 105 Fed. Rep. 348.

The act of February 5, 1903, adds new grounds of opposition to granting discharge to the grounds named in the act of 1898 by amending Sec. 14*b* to read as follows:

"*b*. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

No. 158.

Specifications of Grounds of Opposition to Discharge (1).

The District Court of the United States
For the —— District of ——.
In the matter of the Bankruptcy of
A. B.,
Bankrupt.

Now comes E. F., G. H. and J. K., creditors of the said bankrupt and object to the discharge of said bankrupt for the following reasons:

First. That while a bankrupt he concealed from the trustee the sum of $——, being property belonging to his estate in bankruptcy, and he concealed the further sum of $—— from the trustee, being property belonging to his said estate in bankruptcy.

Second. That under oath he stated in the schedules attached

to his petition in bankruptcy that he had no assets, whereas, and in fact, the assets consisted of $——, at least.

Third. That while under examination under oath before the referee, he falsely stated and testified that said $—— did not belong to him, but was the property of his wife, consisting of a loan to her by her brother A. G., whereas, and in fact said $—— was and constituted his property.

Fourth. That while under examination under oath before the referee herein, he made numerous statements, too numerous to be embodied in these specifications, but are more fully set forth in the transcript of the evidence in this court by the trustee in his report, such statements were knowingly false when made.

Y. & Y.,
Attorneys for Creditors.

(1) See note to No. 157.

No. 159.

Order Referring Petition for Discharge to Referee (1).

The petition of said bankrupt praying that he may be discharged from all his debts pursuant to the acts of Congress relating to bankruptcy coming on for hearing on this day pursuant to orders herein the 26th day of January, 1901, now in accordance with Section 3, No. XII, General Orders in Bankruptcy and no objections or specifications having been filed in opposition thereto, the matter of said petition is hereby referred to A. M., one of the referees in bankruptcy of this court, at the city of ——, to ascertain and report to the court the facts relating to said petition, and the rights of said petitioner to a discharge under the provision of said act.

Witness the Honorable G. R., Judge of said court, and the seal thereof, at ——, in said district, this —— day of ——, A. D., ——.

B. R.,
Clerk of Said Court.

(1) A reference may be made to referee after specifications have been filed to report, but the judge must make the order of discharge. Bank. Act of 1898, sec. 14*l*.

For proceedings for discharge see Loveland on Bankruptcy, chap. 26.

No. 160.

Order Referring Specifications in Opposition to Discharge to Referee.

[*Caption.*]

At the city of ——, in said district, this —— day of —— 190—, —— District of ——, ss.

And now, to wit, this —— day of —— 190— the specifications of objection to the discharge of said bankrupt filed by E. F., of ——, a party interested, are referred to A. M., referee in bankruptcy, at —— as a Special Master, to take the testimony and make report thereof to the court, and of his findings of fact together with his recommendation in favor of, or against, said discharge; said referee to be entitled to receive for his services five dollars ($5.00) for each day actually spent in hearing such reference and preparing his report; such sum to be chargeable in the first instance to the party opposing the discharge; and indemnity may be demanded by the referee before proceeding with the hearing.

No. 161.

Referee's Report on Petition for Discharge.

To the Honorable G. R., Judge of the District Court of the United States for the —— District of ——:

In accordance with an order of your honorable court whereby I was directed to ascertain and report to the court the facts relating to the petition of the said bankrupt for his discharge and the right of said petitioner for a discharge under the provisions of the bankrupt act, I do hereby report that said bank-

rupt's petition to be adjudicated bankrupt was filed on the —— day of ——, and that he was at the time of filing such petition a resident of ——, in the County of ——, in said district.

And I do further report that said bankrupt has in all things conformed to the requirements of said act and that so far as the papers on file with me and the proceedings had before me show, he has committed none of the offenses and done none of the acts prohibited in subdivision B. section 14 of said act and that in my opinion he is entitled to his discharge.

And I do further report that there are assets in said bankrupt's estate and that a trustee has been appointed, that the estate is unsettled and that my disbursements have been provided for.

Dated this —— day of ——.

A. M.,
Referee.

No. 162.

Final Oath of Bankrupt.

In the District Court of the United States,
For the —— District of ——.

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy.

—— District of ——, ss:

I, A. B., of ——, in the county of ——, and State of ——, the bankrupt above named, upon my oath, do hereby declare that, on petition filed by [*or* against] me, I was duly adjudged a bankrupt by the decree of the court made on the —— day of —— A. D. 190—, under and by virtue of an act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved the first day of July, 1898; that I have not knowingly and fraudulently, concealed, while a bankrupt, and am not now concealing from trustee, any of the property belonging to my estate in bank-

ruptcy; that I have not knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bankruptcy; that I have not knowingly and fraudulently presented under oath any false claim for proof against any estate in bankruptcy, or used any such claim in composition, either personally or by agent, proxy or attorney; and that I have not knowingly or fraudulently extorted, or attempted to extort any money or property from any person as a consideration for acting, or for forbearing to act in bankruptcy proceedings; that I have not committed any of the offenses punishable by imprisonment, as provided in said act, nor have I, with fraudulent intent to conceal my true financial condition and in contemplation of my bankruptcy, destroyed, concealed, or failed to keep books of account or record from which my true condition might be ascertained; nor have I done, suffered, or procured to be done, or been privy to any act, matter or thing specified in the said act of Congress as a ground of withholding my final discharge thereunder, or as invalidating such discharge if granted.

Subscribed and sworn to before me this —— day of —— A. D. 190—, at —— in said district.

A. B.

B. R.,

Clerk of Said Court.

(1) Oaths required by the Act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt. Act of 1898, chap. 4, sec. 20.

This oath should not be administered by an officer who is the attorney for the bankrupt.

Bank. Act of 1898. Sec. 14 B (1) and (2). Sec. 29 B (1), (2), (3), and (5).

No. 163.

Clerk's Memoranda of Bankrupt's Petition for Discharge.

In the District Court of the United States,
For the —— District of ——.

In the matter of A. B., Bankrupt. } No. —— In Bankruptcy.

Residence of bankrupt ——.

Name and address of attorney ——.

Petition for adjudication—date of filing ——.

Voluntary or involuntary ——.

Adjudication—date of ——.

Examination of bankrupt—referee's certificate of [Rule 16 (b)] ——.

Certified list of creditors who have proved their claims [Rule 16 (b)] ——.

Final oath [Sec. 14 (b) (1) and (2); Sec. 29 (1) (2) (3) (4) and (5)] ——.

Fees of clerk on petition for discharge [Filing fees—Rule 20 (3) and (5)] ——

Application for discharge [Sec. 14 (a); Rule 14 (a) and (c) and Form 57] ——.

Hearing thereon [Rule 12 (3) G. O.]—date of ——.

Notice by clerk to creditors [Sec. 58 (a) (2) and (b) and (c) Form 57]—date ——.

(1) Names on schedules [Sec. 58 (a)] ——.

(2) Names on proofs of claims [Sec. 58 (a)] ——.

Newspaper designated [Sec. 28 (a); Sec. 58 (b)]—name of ——.

Publication—[See General Provisions, Rule 37 G. O.] ——.

Proof of publication—[N. B.—Correct name; printed notice attached; proof sworn to; bill receipted.]

Date of last publication [10 days before hearing] ——.

Specifications against discharge—date for filing [10 days from hearing] ——.

Appearance in opposition to discharge [Rule 32 G. O.]—date of ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Specifications of objection to discharge [Rule 32 G. O.—— See Form 58.] ——.

Disposition of same [Rule 12 (3) G. O.] ——.

Referee's fees—if paid [Rule 20] ——.

Memoranda:——.

No. 164.

Discharge of Bankrupt (1).

(Official Form No. 59.)

District Court of the United States, —— District of ——.

Whereas, ——, of ——, in said district, has been duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 19—, on which day the petition for adjudication was filed —— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable ——, judge of said district court, and the seal thereof this —— day of ——, A. D. 19—.

[*Seal of the court.*] ——,

Clerk.

(1) The effect of a discharge is not determined by the court granting it but by subsequent proceedings in which the discharge is pleaded as a defense to an action for debt. See *in re* Marshall Paper Co. (C. C. A. 1st Cir.) 102 Fed. Rep. 872, 4 Am. B. R. 468; *in re* Black, 97 Fed. Rep. 493, 4 Am. B. R. 471 (note).

Debts not affected by a discharge—*a*. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or

municipality in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." [Sec. 17, as amended by act of Feb. 5, 1903.]

No. 165.

Deed from Trustee to Purchaser.

KNOW ALL MEN BY THESE PRESENTS: That whereas, on the —— day of —— 19—, A. B. was duly adjudged bankrupt by the District Court of the United States for the —— District of ——, and the said A. M. was duly appointed and qualified as trustee of the estate of the said A. B. in bankruptcy, and is now acting as said trustee, and on the —— day of ——, 19—, said trustee filed a certain petition in said District Court of the United States for the —— District of ——, praying among other things, for an order of sale of certain real estate therein mentioned and hereinafter described.

And Whereas, proceedings were had on said petition in accordance with the bankruptcy laws of the United States in such case made and provided, and the petition coming on for hearing on the —— day of ——, 19—, of which hearing ten days' notice had been given by mail to creditors of said bankrupt, it was ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in his petition and hereinafter described, by auction (*or at private sale, or as may be*), keeping an accurate account of the property sold and the price received therefor, and to whom sold, and on the same day in pursuance of said order and judgment, an order of sale of said real estate therein described, was issued out of said court under the seal thereof to said A. M., trustee of the estate of A. B. in bankruptcy, as aforesaid, directed, commanding him to execute the said order, and of the same, together with his proceedings thereon, to make due return to said court.

And Whereas, said A. M., trustee of the estate of A. B., in bankruptcy, having caused said premises to be appraised, and the report of said appraisement to be filed with S. T., the referee, and having on the —— day of ——, 19—, returned said order of sale to said court as commanded with the proceedings thereon, stating in substance that in obedience to said order he duly advertised the real estate therein described for sale for —— consecutive weeks before the day of sale in the "Gazette," a newspaper printed and of general circulation in said —— County, State of ——, stating in said notice the time, place, and terms of said sale, and on the —— day of ——, 19—, he attended at the place named for the sale, and at the hour of — o'clock — M., he offered said real estate (hereinafter described) for sale, when G. H., bid to pay for the same the sum of —— ($——) dollars, which, being the highest and best bid that was offered, and being more than seventy-five percentum of the appraised

value of said premises, he then and there sold the same to said G. S. for that sum.[1]

And whereas, on the —— day of ——, 19—, the said court having examined the proceedings of the said sale, aforesaid, under said order of sale, and it appearing to the court that said sale was in all respects legally made, ordered that the same be approved and confirmed, and that said A. M., trustee, as aforesaid, should execute and deliver a proper deed to the purchaser, of the real estate so sold.[2]

All of which will more fully appear by the records of said court, to which reference is here made.

Now, therefore, I, the said A. M., trustee of the estate of A. B., in bankruptcy, aforesaid, by virtue of said order of sale, sale, and confirmation, and of the statute in such cases made and provided, and of the powers vested in me and for and in consideration of the premises, and the sum of —— dollars ($——) paid, or secured to be paid to me by said G. H., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said G. H., his heirs and assigns forever, the following real estate, situated in the county of ——, in the state of ——, and in the —— and bounded and described as follows: [*Here set forth the description by metes and bounds.*]

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said G. H., his heirs and assigns forever, as fully and completely as the said A. M. as such trustee in bankruptcy, by virtue of said order of sale, sale, and confirmation, and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof, the said A. M., as such trustee, has hereunto set his hand, this —— day of ——, A. D., 19—.

Signed and acknowledged in presence of:

R. S.

G. T.

A. M.,

Trustee of the Estate of A. B., in Bankruptcy.

The State of———)
County of———) ss.

Be it remembered, that on this —— day of ——, 19—, before me, the subscriber, a notary public, in and for said county, personally came the above named A. M., as trustee of the estate of A. B., in bankruptcy, the grantor, in the forgoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such trustee for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

[SEAL.] J. R.,

Notary Public in and for the —— County of ——, State of ——.

(1) In case of a private sale omit this paragraph and state the terms and conditions of the order of sale actually complied with and proceed with the form as given.

APPELLATE PROCEEDINGS.

No. 166.

Petition for Appeal in Bankruptcy (1).

The District Court of the United States for the —— District of——.

In the Matter of L. W. doing business as L. W. & Son, Bankrupt. } No. ——
} In Bankruptcy.

Petition on appeal of B. Y., trustee in bankruptcy, of L. W., doing business as L. W. & Son, Bankrupt.

The above named B. Y., trustee in bankruptcy, considering himself aggrieved by the judgment made and entered on the —— day of ——, in the above entitled cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the —— Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said

judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the —— Circuit

R. S.

Attorney for B. Y., Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

A. C.

District Judge.

(1) An appeal lies from a court of bankruptcy to the Circuit Court of Appeals in three classes of cases specified in sec. 25 of the Bankruptcy Act of 1898 and in no other cases.

The petition for appeal and the allowance must be made within ten days after the entry of the judgment appealed from. Norcross *vs.* Nave & McCord Merc. Co., 101 Fed. Rep. 796, 4 Am. B. R. 317.

No. 167.

Order Granting Appeal in Bankruptcy, Severing Co-defendants and Allowing Supersedeas.

The District Court of the United States for the —— District of ——.

A. B., *et al.*, Petitioners

vs.

C. D., *et al.*, Respondents.

The defendant, D. G., having heretofore filed herein his petition for appeal and assignment of errors, and having given notice to E. F. and G. H., and they failing to appear, said appeal is allowed to petitioner, and said E. F. and G. H. may be made appellees.

Said appeal is to operate as a supersedeas of the decree of ——, but not to affect the injunction granted ——, upon the execution of a bond in the penalty of $——.

The United States Fidelity and Guaranty Company of Baltimore, Maryland, is accepted on said bond as surety, and said bond is now approved.

No. 168.

Order Allowing Cross Appeal.

[*Caption in Trial Court.*]

This day came the complainant herein by its counsel, and presented the petition for a cross-appeal and an assignment of errors accompanying the same, which petition upon consideration of the court is hereby allowed and the court allows a cross-appeal to the United States Court of Appeals for the —— Circuit upon the filing of a bond in the sum of five hundred dollars ($500.00) with good and sufficient security to be approved by the court.

No. 169.

Bond on Appeal in Bankruptcy (1).

Know all men by these presents, that we, A. B., as principal, and S. R. and L. P., as sureties, are held and firmly bound unto C. D. in the full and just sum of —— ($——) dollars, to be paid to the said C. D., his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this —— day of —— in the year of our Lord one thousand nine hundred and ——.

Whereas lately at a Circuit Court of the United States for the ———— District of ———— in a suit depending in said court, between A. B., plaintiff, and C. D., defendant, a decree was rendered against the said A. B., and the said A. B. having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said C. D., citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the —— Circuit, to be holden at the city of ——, in said circuit, on the —— day of —— next.

Now, the condition of the above obligation is such, that if the said A. B. shall prosecute his appeal to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

L. S. A. B. [*Seal.*]
G. S. S. R. [*Seal.*]
L. P. [*Seal.*]

Approved by
H. S.,
U. S. Circuit Judge.

(1) The bond on appeal from a Circuit or District Court to a Circuit Court of Appeals may be allowed by the circuit or district judge. R. S. sec. 999.

An appeal to operate as a *supersedeas* must be filed in accordance with R. S. sec. 1007. Adams *vs.* Law, 16 How. 148; Kitchen *vs.* Randolph, 93 U. S. 86.

A trustee in bankruptcy is not required to give bond on appeal. Sec. 25*c* of the bankruptcy law of 1898, 30 Stat. at L. 544.

No. 170.

Citation on Appeal in Bankruptcy.

The United States Circuit Court of Appeals, for the —— District.

The United States of America, —— Judicial Circuit, ss.

To The D. M. Grocery Company — Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the —— circuit, to be holden at the city of Cincinnati, in said district, on the —— day of —— next, pursuant to a petition on appeal and assignment of error filed in the clerk's office of the District Court of the United States for the —— district of ——, —— division, in the matter of F. H., doing business as F. H. & Son, to show cause, if any there be,

why the judgment rendered in said cause reversing the finding and order of the referee in bankruptcy disallowing and expunging the claim of The D. M. Grocery Company and ordering the allowance of said claim, as proved by it, before said referee, in the sum of $——, as in said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. C., Judge of said District Court, this —— day of —— in the year of our Lord ——, and of the independence of the United States of America the one hundred and ——.

A. C.,
United States District Judge.

No. 171.

Assignment of Errors to an Adjudication of Bankruptcy.

District Court of the United States, District of ——.
In the matter of A. B. and C. B.
In Bankruptcy.
No. ——.

And now on this the —— day of ——, came A. B. and C. B. by R. X. Esq. and T. B., their attorneys, and say that the judgment in said cause adjudicating them involuntary bankrupts is erroneous and against their just right, and they assign the judgment of said District Court adjudicating them bankrupts is erroneous and against their just right in that it was adjudged that [*here state the ground of the objection, as,* in that they were insolvent, *or* had given a preference, *or as may be.*]

Wherefore the said A. B. and C. B. pray that the said judgment may be reversed and said petition in involuntary bankruptcy against them be dismissed.

R. X.
T. B.
Attorneys for A. B. and C. B.

No. 172.

Assignment of Errors to an Adjudication of Bankruptcy.

The District Court of the United States, for the —— District of ——.

A. B. & Co., *et al.*
vs.
C. D. & Co.,

Your petitioner assigns the following as the errors upon which he will rely:

First. The court erred in failing to hold that the petitioners had estopped themselves from prosecuting their petition herein on account of the execution by the said C. D. & Company of the alleged deed of assignment.

Second. The court erred in adjudicating the firm of C. D. & Company bankrupt.

Third. The court erred in adjudicating the individual members of said firm, and especially your petitioner, bankrupt.

Wherefore, your petitioner prays that the court would allow an appeal herein from the said decree of ——, and would approve a bond for the stay of all proceedings pending such appeal, and your petitioner will ever pray, etc.

D. G.
X. & X.
Attorneys for D. G.

No. 173.

Assignment of Errors by a Trustee in Bankruptcy to the Allowance of a Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of L. W., doing business as L. W. & Son, Bankrupt. } In Bankruptcy.

And now on the —— day of ——, comes the said B. Y., as trustee in bankruptcy of L. W., doing business as L. W. & Son,

bankrupt, by R. X., Esq., his solicitor, and says that the decree in said cause is erroneous and against the just rights of said trustee in bankruptcy for the following reasons:

First. Because the evidence shown and set out in the agreed statement of facts certified by the referee to be correct shows that said The S. D. Grocery Company, received preferences which it did not surrender or offer to surrender at the time of or before proving its claim.

Second. Because the facts as set out in the agreed statement of facts and certified by the referee to be correct shows that said claimant, The S. D. Grocery Company, within four months next preceding the date when the petition in bankruptcy was filed, had received preferences in excess of further credits afterward given in good faith by it to said bankrupt debtor without security of any kind for property which became a part of the estate of said bankrupt debtor, and remained unpaid at the time of adjudication for bankruptcy herein, in the sum of $——.

Third. Because the evidence showed that said claimant, the S. D. Grocery Company, should not be allowed to prove its claim until it had surrendered or offered to surrender the amount of the excess of preference it has received from said bankrupt within four months prior to the filing of the petition in bankruptcy, over the amount of subsequent credits extended to said bankrupt, without security of any kind, by said claimant for property which became a part of the estate of said bankrupt.

Fourth. Because the evidence showed that the finding and order of the referee in bankruptcy disallowing and expunging the claim of said The S. D. Grocery Company was correct and legal.

Fifth. Because the finding, judgment and decree of this court reversing the action of the referee in disallowing said claim for $—— without any refunder of preferring and expunging said claim and in allowing said claim for $—— with-

out any refunder of preference on the part of said claimant is erroneous and illegal.

Sixth. Because the evidence showed that within four months prior to the time of the filing of the petition in bankruptcy claimant received, at different times, within said period, payments of money from said bankrupt in excess of subsequent sales of merchandise to said bankrupt by said claimant without security of any kind therefor.

Wherefore, the said B. Y., trustee in bankruptcy of said L. W., doing business as L. W. & Son, bankrupt, pray that said order, judgment and decree reversing the action and ruling of the referee and allowing the claim of said The S. D. Grocery Company in the sum of $——, be reversed and that the said court may be directed to enter a decree affirming the action ruling an order of the referee.

R. X.

Solicitor for B. Y., Trustee in Bankruptcy of L. W., doing business as L. W. & Son.

No. 174.

Assignment of Errors by a Creditor to Judgment Disallowing Claim.

The District Court of the United States, for the —— District of ——.

In the Matter of A. B. & Co., *et al.*	In Bankruptcy.
vs.	Assignment of
C. D. and Son, Defendants.	Error on Appeal.

And now, on the —— day of ——, came the said E. F. Company, a creditor of the above named defendants, C. D. and Son, by Messrs. X. & X., its solicitors, and says that the judgment and decree, in said cause is erroneous and against the just rights of said creditor of said defendants for the following reasons:

First. Because the evidence shows that the claim of said creditor of said above named defendants was a provable debt against the estate of the bankrupts.

Second. Because the evidence shows that the claim of said creditor of said above named defendants should have been allowed as a valid debt against the estate of the bankrupts.

Third. Because the evidence shows that the judgment and decree should have been in favor of this creditor of the said above named defendants and against the trustee of the above named defendant.

Wherefore, the said creditor of the above named defendant prays that said judgment and decree be reversed, and that the said court may be directed to enter a decree and judgment allowing said claim of said creditor as a provable debt against the estate of the bankrupts, in accordance with the prayer of the bill.

X. & X.

Solicitors for said Creditor, The E. F. Company.

No. 175.

Assignment of Errors to an Order Disallowing Claims in Bankruptcy.

The District Court of the United States for the —— Division of the —— District of ——.

In re A. B. Hardware Company, Bankrupt. } No. ——.

In the matter of the petition of M. R., G. R., and W. R., partners as R. & R., for allowance of their claim for fees and payment of the same, as expenses, or as preferred, out of the assets of the bankrupt.

Assignment of errors by R. & R. in the above matter made a part of their petition for appeal. The said appellants come, and for error in the order and judgment of the court herein, assign as follows:

First. The court erred in holding and adjudging that the general assignment of the A. B. Hardware Company was a fraud upon the Bankrupt Act.

Second. The court erred in holding and adjudging that the services charged for by petitioners, rendered in preparing the said assignment, and in the effort to uphold and execute the same, can not and should not be paid out of the assets belonging to the estate of the bankrupt.

Third. The court erred in holding and adjudging that there was no lien under the statutes and laws of the state of ——, on assets of the bankrupt, in favor of the said R. & R., for the payment of their fees for the services set out in their petition, at the time of the filing of the petition herein for adjudication in involuntary bankruptcy, and at the time such adjudication was made.

Fourth. The court erred in holding and adjudging that the assets of the bankrupt came to the hands of the trustee upon the adjudication of bankruptcy, and his appointment as such, free and discharged of any lien in favor of petitioners for compensation for their said services, and in not holding that such assets were legally and equitably charged, with a lien for and the payment of the compensation due therefor, upon their receipt by the said trustee.

Fifth. The court erred in holding and adjudging that the referee in bankruptcy was in error in ruling that the fee of petitioners for preparing the general assignment was a provable debt against the estate of the bankrupt, and payable out of such estate, and in reversing the judgment of the referee as to the said matter.

Sixth. The court erred in dismissing the petition of petitioners, and in not granting them the relief they therein prayed for.

Wherefore the said R. & R. pray that the judgment of said District Court be reversed with diections to said court to allow their claim.

R. & R.

PETITIONS TO REVIEW ORDERS IN BANKRUPTCY IN A CIRCUIT COURT OF APPEALS.

No. 176.

Notice of Filing Petition for Review (1).

United States Circuit Court of Appeals
For the —— Circuit.

In re Petition of A. B., For Review. } In Bankruptcy.

To R. Y., attorney for the C. D. Trust Company, trustee in bankruptcy for G. H.:

You are hereby notified that on the —— day of ——, at 12 o'clock m., I will file in the clerk's office of the United States Circuit Court of Appeals for the —— Circuit, in the city of ——, a petition for review in the above entitled cause, a copy of which petition is hereto attached as a part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have such case set down for hearing.

R. X.,
Attorney for Petitioner.

I hereby accept service of the above notice this —— day of ——.

R. Y.,
Attorney for C. D. Trust Co., Trustee in Bankruptcy of the said Bankrupt's Estate.

(1) Some notice should be given the parties in the bankruptcy court who are interested in the appeal either by form of citation or notice. The petition is sometimes filed in the Court of Appeals and when docketed and printed, a copy of the printed petition and exhibits are served upon opposing counsel. The better practice, however, is to give notice in substantially the form above given.

No. 178.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy (1).

The United States Circuit Court of Appeals
For the —— Circuit.

In the Matter of A. B. and C. B., Petitioners. } Petition for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the —— Circuit.

The petition of A. B. and C. B. respectfully shows unto the court:

First That on the —— day of ——, A. D. ——, they presented the petition unto the Honorable G. S., judge of the District Court of the United States for the —— District of ——, a true copy of which petition is hereto attached and marked "Exhibit A."

Second. On the —— day of ——, A. D. ——, the said A. H., trustee in bankruptcy, and G. F., administrator of the estate of E. F., deceased, by their counsel, filed a plea and demurrer to said petition, a true copy of each of which is hereto attached and marked "Exhibit B and C." No other persons appeared in opposition thereto.

Third. On the —— day of ——, A. D. ——, the Honorable G. S. entered an order duly dismissing said petition with costs and sustaining said demurrer; said matter having been fully argued before said court.

Fourth. Your petitioners charge the fact to be that the said District Court erred in dismissing said petition and in sustaining said demurrer; and your petitioners are aggrieved thereby and therefore pray this honorable court to review and revise the decision of said court below.

Fifth. No proof was taken in connection with the determination by the Honorable G. S. and the entire proceedings

upon which said dismissal was grounded appear in the exhibits hereto attached.

Sixth. Your petitioners further show that no opinion was filed by said court in the matter.

Seventh. Your petitioners therefore pray that such order of the District Court be set aside and held for naught and that by the order of this court it be decreed that your petitioners have a right to have an issue framed and the truth of the averments contained in their said petition determined according to the rules and procedure applicable in such cases, and that your petitioners be given such other relief as shall be proper.

That an order be entered directing the manner and time of service of this petition. A. B.,

C. B.,

R. X., Attorney for Petitioners.

A. B., one of the petitioners mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief. A. B.

Sworn and subscribed to before me this —— day of ——, A. D. ——. J. N.,

Notary Public, —— County. ——.

(1) Congress has provided two means of review by a Circuit Court of Appeals of orders and judgments of a court of bankruptcy. Sec. 25 of the Bankruptcy Act of 1898 provides for appeals in three classes of cases. Par. 24*b* of the same act provides for superintending and revising in matters of law only. An appeal is taken in the usual form, and the Court of Appeals may review both matters of fact and law on such proceedings. But on a petition to review an order of a court of bankruptcy the Circuit Courts of Appeals are confined to questions of law. This distinction has been clearly made in the opinions. See Mueller *vs.* Nugent, 184 U. S. 1; Cunningham *vs.* German Ins. Bank, 101 Fed. Rep. 977, 4 Am. B. R. 192; Courier-Journal Job Print. Co. *vs.* Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699, 4 Am. B. R. 183; *in re* Rouse, Hazard & Co., 33 C. C. A. 356, 91 Fed. Rep. 96; *in re* Richards, 37 C. C. A. 634, 96 Fed. Rep. 935; *in re* Abraham, 35 C. C. A. 592, 93 Fed. Rep. 767; *in re* Purvine, 37 C. C. A. 446, 96 Fed. Rep. 192. See also Loveland on Bankruptcy, sec. 312.

This petition should be filed in the United States Circuit Court of Appeals. *In re* Williams, 105 Fed. Rep. 906; Courier-Journal Job. Print Co. *vs.* Schaeffer-Meyer Brew. Co., 101 Fed. Rep. 690, 4 Am. B. R. 183. As to the form of petition and proceedings on petition to review and revise matters of law in a Circuit Court of Appeals, consult Loveland on Bankruptcy, sec. 313.

The statute prescribes no time limit within which to file a petition for review in a Circuit Court of Appeals. *In re* New York Economical Printing Co., 106 Fed. Rep. 839, 5 Am. B. R. 697; *in re* Good, 99 Fed. Rep. 389, 3 Am. B. R. 605.

No answer or reply need be filed to a petition for review in a United States Circuit Court of Appeals. A question of law is presented to the court substantially as on a writ of error.

The record must contain sufficient matter upon which the court may review and revise a question of law and no other. See Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932.

No. 179.

Petition in a Circuit Court of Appeals to Review an Order in Bankruptcy Disallowing Labor Claims.

The United States Circuit Court of Appeals
For the —— Circuit.

In re A. B. & Company *et al.*, Petitioners.

And now comes E. F., for himself and eighty-eight other labor claimants, whose names, as well as the amounts due them, respectively, for labor performed by them for said A. B. & Company within three months next before the appointment of the receiver, August 27th, 1898, appear in the agreed statement of facts attached to this petition and marked "Exhibit A," and, complaining of the orders and judgment heretofore rendered against these complainants by the Hon. A. J., judge of the District Court of the United States for the —— District of ——, says:

On the 22nd day of October, A. D. 1900, this cause came on to be heard before said judge, to review the proceedings and

final order of A. M., Esq., one of the referees in bankruptcy within and for said district, which said proceedings and final order was based upon said agreed statement of facts.

All creditors and all persons in interest having consented to said agreement, and to this proceeding, and having so consented after the expiration of the time limited for other persons to come into the case, it is conceded that all are bound by the order of this court under the provisions of said stipulation.

Your petitioners contended in the court below, as they now contend in this court:

First. That upon the facts set forth in said agreed statement of facts which is attached hereto, marked "Exhibit A," and made a part of this petition, said funds passed into the hands of the said trustee charged by force of the laws of —— with an equitable lien in favor of said claimants, and each of them, as set forth in schedule B, attached to said statement of facts, and that said claimants were and are entitled to be first paid from said funds after the payment of taxes and costs of administration.

Second. That in said proceeding of the Common Pleas Court, that court acquired full and complete jurisdiction for the purpose of determining the respective rights of the parties to that suit. That the parties and subject matter were all before that court, and that no other court had jurisdiction, nor could they acquire jurisdiction to adjudicate and determine the issues there involved.

That no proceedings were ever instituted in the court of bankruptcy to stay that proceeding, and that that court had, therefore, complete jurisdiction to proceed as it did proceed to final decree, and that before the adjudication in bankruptcy.

The petitioners, therefore, contended, as they now contend, that that fund was in the custody of that court, which was

proceeding to administer upon it, and that by reason of the ruling and judgment herein complained of, they have been aggrieved and damaged to the full extent of the several amounts due them as aforesaid.

This cause thus being submitted to the court on questions of law arising upon the facts so as aforesaid agreed upon by all the parties having an interest in the estate of said bankrupt, or either of them, the court decided and held, as matter of law.

First. That section 3206*a* of the Revised Statutes of —— created no lien in favor of said labor claimants upon the funds in the hands of the receiver in the state courts, or in the hands of the trustee in bankruptcy for distribution.

Second. That section 64*b* of the Bankrupt Act does not fix or prescribe any lien in favor of the wages due these claimants.

Third. That under the facts set forth under the agreed statement of facts, said labor claimants have no interest in said funds other than as common creditors.

The court declined to pass upon and construe the effect and validity of the decree of the Court of Common Pleas of —— county, ——, in favor of said labor claimants January 13th, 1899.

The court thereupon ordered, adjudged and decreed that the orders of said referee heretofore made in this case upon the same issues, and based upon the same facts in respect to these labor claims, be affirmed, and that the petition of these claimants on their behalf be, and the same was dismissed. A copy of said order, marked "B," is attached hereto.

To all of which ruling of law and judgment of the court these labor claimants at the time excepted and still do except, and they now pray this honorable court to review said rulings, orders and judgments of the honorable District Court herein complained of, order the payment of said labor claims as set forth in said schedule "A," attached to said agreed statement

of facts from the funds now in the hands of the trustee, H. S., and for such other relief as they may be found entitled to.

Y. & Y.

Attorneys for all the within named labor claimants and Petitioner E. F.

United States of America, State of ——, County of ——, ss. District aforesaid.

E. F., being the petitioner above named, for himself and others, does hereby make solemn oath that the statements contained in the foregoing petition subscribed by him are true.

E. F.

Sworn to and subscribed by E. F., before me, this —— day of ——, A. D. ——.

W. E.,
Notary Public,
—— County.

(1) Taken from the record *in re* Laird, 109 Fed. Rep. 550, 48 C. C. A. 538.

No. 177.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy to Compel Assignee to Pay over Moneys to Trustee.

United States Circuit Court of Appeals, Sixth Circuit.

Leonard Comingor, Petitioner. } In Bankruptcy.

The petitioner, Leonard Comingor, respectfully represents that on the 14th day of February, 1899, Sinsheimer, and others, creditors of Simonson, Whiteson and Company, filed their petition in bankruptcy in the District Court of the United States for the district of Kentucky, showing that said debtors made an assignment to this petitioner December 5th, 1898, for the benefit of creditors, asking an adjudication in bank-

ruptcy and praying a subpœna against the alleged bankrupts and this petitioner, to which said alleged bankrupts tendered answer and plea and this petitioner did, March 21st, 1899, move the court to dismiss as to him and without waiving the same, tender an answer, although nothing was alleged against him save that he was assignee for creditors. Petitioner says that no further notice was taken of him in this proceeding and no action taken on his motion to dismiss or offer to answer. He says that in both subsequent appeals and in all proceedings subsequent to said motion to dismiss, he was simply dropped out of the case by common consent. He says he was never treated or considered as a party to this bankruptcy proceeding by the court or the parties, since March, 1899, either in the District Court or either of the appeals to this court, as the orders, pleadings and records will show. (See record in this court No. 716, page 20, paragraph 3, which record is hereinafter referred to as part hereof.)

This petitioner says further that on March 28th, 1899, said Simonson, Whiteson and Company were adjudged bankrupts and an appeal was taken to this honorable court, resulting in a reversal, with directions to the District Court to allow the tendered answer of Simonson, Whiteson and Company to be filed and directing a trial on issue made. In accordance thereto said District Court did on August 12th, 1899, set aside and annul said adjudication, file said answer, and on the 20th day of September, 1899, again adjudge said Simonson, Whiteson and Company bankrupts, who again appealed, September 22nd, 1899. All of the matters herein so far referred to appear in Records Nos. 716 and 777, in this court, and are referred to as parts hereof.

Petitioner says that on said last appeal the adjudication of the said District Court, made the 20th day of September, 1899, was affirmed and the mandate of this court was filed below on the 17th day of May, 1900, and the case referred to Baskin, referee in bankruptcy, who did on the 28th day of May, 1900, enter an order without notice and no appearance of any one,

directing this petitioner to file with him an itemized statement of receipts and disbursements as assignee under the deed of assignment of the bankrupts and to appear before him in person to settle his accounts as said assignee. A certified copy of said order was served on this petitioner and is filed herewith as part hereof, marked Exhibit No. 1.

Petitioner says that he was thus required to give and did give to said referee said itemized account, from which it appeared that before any proceedings in bankruptcy he had realized on all the assets of the bankrupts, under direction and order of the state court, where a suit was pending long before any petition in bankruptcy, in which he was settling his accounts; that he realized from said assets the sum of $92,865.77, being over 22 per cent. more than the appraised value as made under oath by the appraisers appointed by the state court; that he had disbursed for expenses in carrying on the business and converting assets into cash the sum of $19,876.73; that he drew as his commissions $3,398.90, and paid his counsel for necessary services $3,200.00, all before any proceedings in bankruptcy. A copy of said statement is filed as part hereof, marked Exhibit No. 2.

Whereupon on the 20th of June, 1900, the referee entered an order appointing the Louisville Trust Company receiver herein and directing the said receiver to apply to the Jefferson Circuit Court, Common Pleas Division, for an order directing the state court receiver to pay over to the receiver herein the entire fund in said state court in the action of L. Comingor, asignee, etc., *vs.* Simonson, Whiteson and Co., at the same time directing that the receiver shall not appear in said action and shall not receive less than the whole sum in said court. Said referee's order further required petitioner herein and his counsel in said state court proceedings to appear three days thereafter and show cause why they should not pay over to the receiver the sums held by them as commissions and fees and the balance of $6,766.53, not then paid into the state court by Comingor, assignee, for creditors and still in his hands. A

copy of said order is filed as part hereof, marked Exhibit No. 3. On the next day, June 21st, 1900, said Trust Company, receiver herein, appeared before said state Circuit Court and asked leave to withdraw the entire fund in court, $46,305.03, all of which was submitted to said Circuit Court. A copy of said motion is filed as part hereof, marked Exhibit No. 4. Accompanying said motion was a notice served on petitioner by the receiver in bankruptcy that the motion would be made before the state court June 21st, 1900, and a copy of an injunction of the District Court in this matter enjoining and restraining this petitioner from making any opposition to said motion, said injunction expressly prohibiting this petitioner by name " from taking any steps, instituting or having any proceedings affecting the estate and assets of Simonson, Whiteson and Co., in any state court and especially in action No. 19,944, entitled L. Comingor, etc., *vs.* Simonson, Whiteson, etc., pending in the Jefferson Circuit Court." A certified copy of said injunction and said notice are hereby filed herewith as part hereof marked Exhibits Nos. 5 and 6, respectively. All of which the state court took under advisement.

At the same time that the receiver in bankruptcy was applying to the state court as shown, and your petitioner was restrained from opposing or appearing in response to said notice, the referee in bankruptcy, *sua sponte,* ruled the petitioner herein to pay to said receiver the money retained by him as commissions as appears in said Exhibit No. 3. Petitioner responded June 23rd, 1900, to this rule, that he retained the money as his commissions as assignee under the deed before any proceedings in bankruptcy, and that he had used them and was unable to pay it to the receiver. A copy is herewith filed as part hereof, marked Exhibit No. 7. Immediately on filing said response, said referee adjudged the same insufficient, made the rule absolute, and ordered the petitioner to pay said sum to the receiver before June 30th, 1900. A copy of said order is filed herewith as part hereof marked Exhibit No. 8. Before said date, however, viz.: June 28th, 1900, said

referee, without notice or appearance of any one and *sua sponte* entered another show cause order and had the same served on petitioner, ruling him to pay by June 30th, 1900, to the receiver in bankruptcy the further sum of $3,000.00, " recited in his report," as having been paid to his counsel and the further sum of $200.00, as shown in said report to have been paid to others counsel. A copy of which order is filed as part hereof, marked Exhibit No. 9. To which this petitioner responded June 30th, 1900, that these payments were made before any bankruptcy proceedings, that he has no means to pay said sums to the receiver, that before the petition in bankruptcy was filed and before he had any knowledge, information or intimation that it would be filed, relying upon it that he would wind up his trust under the assignment, he filed his petition in the said court and his action is there pending and he is still subject to that jurisdiction and required to settle in the state court. A copy of this response is filed as part hereof marked Exhibit No. 10. On the same day that said response was filed, June 30th, 1900, the Jefferson Circuit Court declined to entertain said bankruptcy receiver's motion hereinabove shown to withdraw funds from the court, because said receiver was not a party to the action, and said court suggested that the motion would be entertained when said receiver filed its petition asserting claim to the fund as provided in section 29, Kentucky Code of Practice. Said ruling of the court is in writing and a copy thereof is filed as part hereof, marked Exhibit No. 11.

In accordance with the suggestion of the state Circuit Court the receiver (who had in the meantime been chosen trustee in bankruptcy), did on the 3rd day of July, 1900, file a claimant's petition under said Kentucky Code provision, in the state Circuit Court, making himself a party to said action, having been directed so to do by the order of the referee in bankruptcy. A copy of said petition and exhibits attached thereto, including the said referee's order are filed as parts hereof, marked Exhibit No. 12. Thereafter, on July 5th, 1900, said trustee in

bankruptcy tendered his proposed order for withdrawal of said fund accompanying the same with notice to petitioner's counsel and their response whereupon the court made him a party and entered the motion for leave to withdraw the funds then in said court, and sustained his motion and gave said trustee leave to withdraw, which was done. A copy of said motions or order and the notice to petitioner's counsel and their reply is filed as part hereof, marked Exhibit No. 13.

From all of which it appears that the trustee in bankruptcy became a party to the petitioner's suit for settlement in the state court, made it appear to said court that all its officers, including petitioner and his counsel, were paid and the fund remaining in said court would be distributed among the creditor beneficiaries of said deed of assignment and thus obtained the said fund for distribution in bankruptcy herein. At the same time, whilst this was being done, the petitioner was under injunction from the District Court herein as already shown, preventing any action on his part in said state court, and at the same time was being pressed by said show cause rules of the referee in bankruptcy to surrender his commission and pay back the money expended by him in paying counsel before any bankruptcy proceedings, his response to said rules, among other things, showing that the state court suit was pending and he was within that jurisdiction making his settlement. He, therefore, filed his petition for review by the District Court, a copy of which is filed as part hereof, marked Exhibit No. 14. Upon which the referee filed his report in said District Court, of which a copy is filed as part hereof, marked Exhibit No. 15. On the 7th day of July, 1900, said petition for review came on for hearing before the District Court, was heard, and the District Court took time to consider; then, on the 16th day of July, 1900, the court entered an order referring the matter back to the referee with directions to take testimony concerning the character of the services of the petitioner and his counsel under the deed of assignment, and their value to the bankrupt estate, and directing the referee to report findings of fact

and any modification he might choose to make of his former report and recommendation, a copy of which is filed as part hereof, marked Exhibit No. 16. Whereupon the referee immediately commenced taking evidence and continued to take from time to time, during which, viz.: on the 10th day of November, 1900, this petitioner filed an additional response before the referee, showing in substance that as appears in these proceedings, neither the referee nor the District Court has any jurisdiction of the petitioner or of the subject matter in controversy, and this whole proceeding is illegal and in conflict with the provisions of the bankruptcy law. A copy of said response is filed as part hereof, marked Exhibit No. 17. Thereafter the referee reported to the District Court on December 11, 1900, in which report he declines to modify his former rulings and report and recommends the dismissal of petitioner's appeal to the District Court for review. A copy of said report is filed herewith as part hereof, marked Exhibit No. 18. Thereafter, on December 22nd, 1900, and whilst this matter was pending before the District Court, the said amended or additional response (Exhibit No. 17) was also filed in said court.

Thereafter, on the 19th day of January, 1901, the District Court filed an opinion, of which a copy is filed as part hereof, marked Exhibit No. 20, sustaining the referee and dismissing the petition for review and directing proper orders to be entered to that end, which orders were entered on the 26th day of January, 1901, and a copy of the same is filed as part hereof, marked Exhibit No. 21, and which is in words and figures as follows:

In the District Court of the United States, Saturday, January 26th, 1901.

In the matter of Sinsheimer, Levinson & Co., etc., *vs.* Simon, Whiteson & Co., D. G. Simonson, I Whiteson & Leo Stern.	In Bankruptcy.

This cause coming on to be heard on the petition of Leonard Comingor, for review of the order of court entered herein by John B. Baskin, one of the referees of this court, requiring Leonard Comingor to pay over to the Louisville Trust Company, trustee in bankruptcy herein, the sums of $3,398.90 and $3,000.00 and the court being fully advised, delivered a written opinion which was filed herein, and on Jan. 19, 1901, and in pursuance of said written opinion, it is considered, ordered and decreed by the court that said petition for review filed by said Comingor, June, 1900, is refused and dismissed, to which said Comingor excepts and it is adjudged and ordered by the court that said Comingor pay to said Louisville Trust Company, trustee, the said sums of $3,398.90 and $3,000.00 on or before February 16th. 1901, to all of which said Comingor excepts.

Your petitioner further shows that he is aggrieved by the orders of said District Court and injured thereby and that the errors complained of consist:

First. In said court holding that the referee and said court had jurisdiction and power to proceed against petitioner Leonard Comingor, in the summary way had, he being a third party, and not one of the bankrupts, in said court refusing and dismissing said petition for review and in not sustaining same.

Second. In said court holding that it had jurisdiction and power upon the proceedings, orders and recommendations of the referee had to adjudge said Leonard Comingor in contempt, and to punish him for contempt, or to order him to pay said money.

Third. In said court holding that the referee had jurisdiction and power to proceed against said Leonard Comingor, in said summary manner had.

Fourth. In said court holding that said Leonard Comingor held said money for the bankrupts and could be proceeded against in said summary manner had.

Fifth. In said court holding that it had the power and juris-

diction herein to grant or issue the injunction against Leonard Comingor.

Sixth. In said court holding that said referee had the power or jurisdiction to issue said show cause orders or rules thereon or to proceed against said Leonard Comingor in the manner had upon said orders issued.

Seventh. In said court holding that the filing of said responses of Leonard Comingor gave said referee or court jurisdiction or power to proceed thereon in any manner in said matter, or in the manner had.

Eighth. In said referee and said court adjudging said responses and each of them insufficient.

Ninth. In said court finding the facts to be and adjudging that said sums of money were the property of the bankrupts' estate and that said Leonard Comingor never claimed title to any of it nor made any claim of right to it, or ownership thereof at any time, and that he had never claimed to have converted it to his own use, or to have claimed it adversely to the bankrupts or the trustee or the receiver in bankruptcy.

Tenth. In the court's adjudging that said money was not converted by Leonard Comingor to his own use, but held for the benefit of the trustee.

Eleventh. In the court's adjudging that said Leonard Comingor was properly before the court in said proceedings.

Twelfth. In the court's failing to dismiss said contempt proceedings against Leonard Comingor and discharging him.

Thirteenth. In the court's finding as a fact and adjudging that said Leonard Comingor was a party to this proceeding in bankruptcy.

Fourteenth. In the court adjudging and ordering said Leonard Comingor to pay said sums of money to the receiver (who afterwards became the trustee in bankruptcy) in the summary manner had, after ordering said receiver and trustee to make itself a party to the state court proceeding which was done, and the receiver and trustee became a party to said suit in

the state court and withdrew all the money paid into the state court by said Leonard Comingor.

Fifteenth. In the court holding that the proceedings herein against petitioner Comingor are equivalent to a plenary proceeding against him.

Sixteenth. In the court holding that the acts and proceedings herein by or on behalf of the petitioner, Comingor, amount to or are equivalent to or constitute a consent to the jurisdiction of the referee in bankruptcy or the District Court herein, in these proceedings against petitioner.

Wherefore your petitioner prays that the orders, judgments and decrees of the District Court be reviewed and revised in the matters of law and that it be adjudged that said District Court was without jurisdiction, and if that can not be done, then adjudge that the summary proceedings herein were illegal and void or if that can not be done then adjudge that his responses were sufficient in law and he be discharged. He prays for an order of this honorable court directing the District Court to suspend the execution of its judgment of January 26th, 1901, and all further proceedings against your petitioner in this matter until the further order of this court, and he prays further for all other necessary and proper relief herein.

R. X.,
Attorney for Petitioner.

State of Kentucky, County of Jefferson, ss.

Petitioner, L. Comingor, on oath states that the statements of the foregoing petition are true as he believes.

Leonard Comingor.

Subscribed and sworn to before me by L. Comingor, this 28th day of January, 1901. My commission expires January 6, 1904.

D. A. Sachs,
Notary Public in and for Jefferson County, Kentucky.

(1) Taken from the record in Louisville Trust Co. *vs.* Comingor, 184 U. S. 18.

No. 180.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy Marshalling Liens.

United States Circuit Court of Appeals
For the —— Circuit.

In the matter of
E. F., S. H., & J. K.,
vs.
The A. B. Company, Bankrupt. } In Bankruptcy.

Petition of First National Bank of —— for Review.

The petition of the First National Bank of ——, a creditor of the A. B. Company, bankrupt herein, respectfully shows to this court that on the 3rd day of April, 1899, a creditor's petition was filed against the said A. B. Company, which is a corporation, in the District Court of the United States for the district of ——, and that on the 21st day of April, 1899, the said A. B. Company was duly adjudged a bankrupt, and that on said 21st day of April the District Court of —— referred said estate to A. M., referee for said court, and that one of the purposes of said reference was for said referee to receive claim against said bankrupt's estate, allow or disallow same, and to pass upon secured and preferred claims.

Your petitioner shows that on the 7th day of June, 1899, it filed its duly verified proof of claim with said referee, setting up a claim against said bankrupt's estate for seventeen hundred ($1,700.00) dollars, said claim consisting of a note for a like amount, signed by said bankrupt and A. B., and also claiming and asserting a lien upon certain property of said bankrupt under and by virtue of a mortgage executed by said bankrupt to said A. B., J. F. and N. G. mortgagees, to secure them or any of them from loss by reason of their being liable as sureties for debts of said bankrupt or becoming liable therefor within a period of four years thereafter. The property conveyed by said mortgage is as follows:

"Lying and being in —— county, of ——, and more particularly described as follows, to wit:

[*Here describe the property mortgaged.*]

Said mortgage was dated April 15th, 1892, was duly acknowledged and recorded October 12th, 1892, and the limit of indemnity afforded the mortgagees thereby was twenty-five thousand ($25,000.00) dollars. A copy of said mortgage was filed with said proof of claim, and a copy thereof is filed herewith as a part hereof marked "Exhibit A."

Your petitioner further shows that its said debt was originally created April 10th, 1895, within the four years' limit set out in said mortgage, and it claimed and now claims to be substituted and subrogated to the rights of said mortgagee, A. B., under said mortgage and that its said debt was protected thereby and entitled to share in the indemnity thereof. Your petitioner also showed and shows that its said debt was originally for the sum of three thousand ($3,000) dollars, and had been reduced from time to time by partial payments thereon down to seventeen hundred ($1,700) dollars, and that this sum was due and unpaid, and is now due and unpaid, and the lien had not and has not been waived, released nor in any wise relinquished.

Your petitioner further shows that on the 18th day of November, 1899, said referee passed upon its said claim, and allowed it only as a general or unsecured claim against said bankrupt's estate, and refused to allow the same as secured or entitled to any lien under said mortgage dated April 15th, 1892, or the rights of the said mortgagee, A. B., therein. A copy of the order of said referee upon the claim is filed herewith as a part hereof, marked "Exhibit B."

Your petitioner shows that thereafter on the 24th day of November, 1899, it filed its petition for review with said referee, setting out the error complained of, and that the referee forthwith certify to the judge of the District Court the question presented, a summary of the evidence relative thereto and the finding and order of the referee thereon. Whereupon said

referee certified to said judge the question presented, a summary of the evidence relating thereto, the finding and the order thereon. A copy of said order of the referee is filed herewith as a part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 1st day of December, 1899, the judge of the said District Court in reviewing the findings and orders of the referee on said questions, held that said debt was only a common or unsecured claim against said bankrupt's estate and not protected nor secured by the mortgage of April 15th, 1892, but said District Court allowed as a prior and secured claim a debt of twenty-five thousand ($25,000) dollars due to the Third National Bank by said bankrupt, giving to said bank the entire indemnity afforded by said mortgage of April 15th, 1892, and adjudging to said bank a lien for the entire sum of twenty-five thousand ($25,000) dollars. A copy of the order of the said District Judge is filed herewith as a part hereof marked "Exhibit D."

Your petitioner further shows that the question of law decided by the District Court was, that under the provisions and construction of the mortgage of April 15th, 1892, your petitioner was not entitled to any share or *pro rata* in the indemnity of said mortgage, or to be substituted to the rights of the mortgagee, A. B., thereunder, but that the Third National Bank was entitled to and should receive all of said indemnity, and be adjudged a lien for the entire sum of twenty-five thousand ($25,000) dollars.

Your petitioner further shows that at the time the District Court made the order complained of herein there was only twenty-two thousand ($22,000) dollars of indebtedness of said bankrupt due said Third National Bank which was in existence at the execution of the mortgage, or was created within four years thereafter, and that the balance of said twenty-five thousand ($25,000) dollars, to wit, three thousand ($3,000) dollars, was not created until more than four years

after the execution of said mortgage, and said three thousand ($3,000) dollars was not and is not secured thereunder.

Your petitioner further shows that it is aggrieved by the orders of the said District Court, and injured thereby, and that the error complained of consists:

First. That said District Court did not allow and refused to adjudge your petitioner a lien for its said debt upon the property of said bankrupt's estate under and by virtue of the provisions of the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder, upon the property of the bankrupt described therein, and refused to subrogate your petitioner to said mortgagee's rights.

Second. That said District Court did not allow, and refused to adjudge your petitioner its *pro rata* share upon its said debt of the indemnity afforded the mortgagees in the mortgage of April 15th, 1892.

Third. That said District Court allowed and adjudged to the Third National Bank the full amount of indemnity afforded the mortgagees in the mortgage of April 15th, 1892, to secure a debt of twenty-five thousand ($25,000) dollars, when your petitioner shows that three thousand ($3,000) dollars thereof was not and is not secured by said mortgage.

Fourth. That said District Court adjudged that the entire security of said mortgage redounded to the benefit of said Third National Bank, when the debt of said bank is not specifically provided for therein, nor does said mortgage show said bank is entitled to any priority or security superior to your petitioner.

Your petitioner shows that under the provisions of the mortgage of April 15th, 1892, and under the rules of equity and the law of substitution and subrogation, and under section 64, b. 5, chapter 7, of the Bankruptcy Act of 1898, your petitioner is entitled to all the rights of said mortgagee, A. B., to the extent of its said debt, and that thereunder your petitioner has a lien upon the property in said mortgage described to secure its said debt, inferior only to that of the S. Trust Com-

pany, trustee, and Mrs. Anna Mueller, and of equal dignity to the lien of the Third National Bank, and that it was the duty of the District Court to so hold.

Your petitioner asks for an early hearing of this matter, and that the same may be presented upon the petition and exhibits filed herewith, or if your honors so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the clerk of the United States District Court, where said proceedings were had.

Wherefore, your petitioner prays that the order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner a lien for its said debt under the mortgage of April 15th, 1892, and the rights of mortgagee, A. B., thereunder for its costs herein, and all proper and equitable relief.

R. X.,
Attorney for Petitioner.

[*Verification.*]

Taken from the record in Courier-Journal Job Printing Co. *vs.* Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699; 41 C. C. A. 614.

No. 181.

Petition to a Circuit Court of Appeals to Review an Order in Bankruptcy under Sec. 67f.

The United States Circuit Court of Appeals
For the —— Circuit:

In the matter of A. B., Bankrupt, } In Bankruptcy.

Your petitioner, T. A., comes and shows to the Honorable Court, that on September 10, 1900, A. B. was adjudged a bankrupt in the District Court of the United States for the —— Division of the —— District of ——, and that on the 22nd day of the same month your petitioner was duly appointed trustee of the estate of said bankrupt, and having qualified

as such, has since been, and is now, in the discharge of the duties of said trust.

At the time of filing his petition in bankruptcy, the said A. B. was the owner of a stock of merchandise in —— county, ——, which he had acquired about two months previous, and which constituted all his available assets. In October, 1893, C. Bros. obtained judgment against him in the Supreme Court at ——, for $—— and cost of suit. An *alias* execution was issued on this judgment by the clerk of the Supreme Court on September 6, 1900, tested the first day of the preceding term, to wit, the second Monday in September, 1899, which came to the hands of the sheriff of —— county, ——, the next day, and was by him, on September 8, 1900, levied on said stock of merchandise. This with the levy of another execution, precipitated the bankruptcy of A. B., who filed his petition the same day, but a few hours later. He was insolvent when the levy was made, and had been more than four months prior thereto.

Under the orders of the bankrupt court said stock of goods was turned over to petitioner as trustee, who converted the same into cash. The proceeds were enough to pay said judgment and cost, but insufficient to pay all the creditors of said bankrupt.

The said judgment creditors asserted a prior claim to the proceeds of said stock of goods, claiming a lien thereon by virtue of the levy of said execution as of the date of the *teste* of the execution, which your petitioner denied, insisting the levy and whatever lien the creditors obtained by said levy, was avoided by the subsequent bankrupt proceedings had within four months next after the levy. The referee refused to allow the judgment creditors priority, sustaining the contention of the trustee, but his action was overruled by said district judge, who sustained the contention of the said judgment creditors, and ordered the payment of their judgment, interest and cost in full.

Your petitioner excepted to the said action and judgment

of said district judge, and the said creditors and petitioner filed in said court a condensed and agreed statements of facts and the record in the cause, and a duly certified copy of the same is filed herewith as Exhibit No. 1, with the prayer that it be made part of this petition.

Your petitioner shows that the levy and lien created by the levy of said execution, was avoided by the subsequent bankruptcy proceedings, under section 67*f* of the B. A. of 1898, making null and void all levies, judgments, attachments or other liens, obtained against an insolvent person at any time within four months prior to filing a petition in bankruptcy, and the said trustee is aggrieved by the action and judgment of said district judge in refusing to avoid the levy of said execution and discharge the lien created thereby, thus defeating the lawful application of the section referred to, and preventing a ratable distribution of the estate of said bankrupt amongst all his creditors.

The trustee therefore prays that he be allowed to file this, his petition for a review of the action of said district judge, and that said judgment be reviewed, revised and reversed, and that petitioner be allowed and directed to make a ratable distribution of the estate of said bankrupt amongst all his creditors, and he will ever so pray.

T. A., Trustee.
R. Y., Attorney.

State of ——,
County of ——, ss.

Personally appeared before me, the undersigned authority, T. A., and makes oath in due form of law, that he is the trustee in the foregoing matter, and is familiar with all the facts set out in the foregoing petition, and that the same are true to the best of his knowledge and belief.

T. A.,

Sworn to and subscribed before me, this —— day of ——.

[*Seal.*]

J. N.,
Notary Public in and for ——,
County ——.

(1) Taken from the record *in re* Darwin, Petitioner, 117 Fed. Rep. 407.

MISCELLANEOUS ENTRIES, ORDERS, ETC.

No. 182.

Stipulation Reducing Record.

The District Court of the United States, for the
—— District of ——.

A. B., Plaintiff,

vs.

C. D., Defendant.

In the above-entitled case, it is hereby stipulated by the solicitors for the parties thereto that if an appeal be taken, the clerk, in making a transcript of the record may omit therefrom the following papers and records, to wit, [*here set forth the papers and records by name which are to be omitted,*] and that an order may be entered if the same to the court shall seem proper, in accordance with this stipulation.

Dated ——. [*To be signed by all the solicitors.*]

(1) Unless a stipulation or *præcipe* is filed with the clerk, designating what parts of the record are to be included in making a transcript, it is his duty to send up the whole record in the strict sense of the word, made as directed by R. S. sec. 750. Keene *vs.* Whitaker, 13 Pet. 459; Curtis *vs.* Petitpain, 18 How. 109; West *vs.* East Coast Cedar Co., 113 Fed. Rep. 737; Meyer *vs.* Mansur & Tebbetts Imp. Co., 85 Fed. Rep. 874; 29 C. C. A. 465; R. R. Co. *vs.* Schutte, 100 U. S. 644; Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932; Nashua & Lowell Corp. *vs.* Boston & Lowell Corp., 61 Fed. Rep. 237 (244), 9 C. C. A. 468.

If the record is too meager the Appellate Court, upon proper application, settles it by a *certiorari.* Redfield *vs.* Parks, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; Hoskin *vs.* Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. If it contain unnecessary matter, the Appellate Court can rectify this in fixing the costs of the case.

In case the clerk is requested by one party to include a paper in the

transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. Hoe *vs.* Kahler, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. Smith *vs.* Craig, 100 U. S. 226.

No. 183.

Praecipe Designating Parts of Record to be Included in Transcript of Appeal or Writ of Error (1).

The District Court of the United States
For the —— District of ——.

A. B.,
vs.
C D.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the —— Circuit, pursuant to an appeal [*or* writ of error] allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

[*Here specify by name each paper desired to be included in the transcript.*]

Respectfully,
X. & X.,
Attorneys for Appellant [*or* Plaintiff in Error.]

(1) The certificate of the clerk should show that the transcript of record was made in accordance with *præcipe* of the party removing the case, designating the papers to be included. See Meyer *vs.* Mansur & Tebbetts Imp. Co., 85 Fed. Rep. 874, 29 C. C. A. 465; Nashua & Lowell Corp. *vs.* Boston & Lowell Corp., 61 Fed. Rep. 237 (244), 9 C. C. A. 468; Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932; R. R. Co. *vs.* Schutte, 100 U. S. 644; West *vs.* East Coast Cedar Co., 113 Fed. Rep. 737.

It is proper, but not necessary, for counsel to submit *præcipe* to adverse counsel before the transcript is made. In case the clerk is requested by one party to include a paper in the transcript and is requested by the other party to leave out the same paper, he may apply to the judge for instruction. Hoe *vs.* Kahler, 27 Fed. Rep. 145.

The clerk should not transmit original papers except for the purpose of inspection. Smith *vs.* Craig, 100 U. S. 226.

No. 184.

Praecipe for Transcript in Bankruptcy (1).

[*Caption.*]

To Clerk:

Please make transcript of following named papers in the above entitled matter:

First. Claim of The E. F. Company.

Second. Petition of trustee to expunge said claim.

Third. Waiver of the E. F. Company as to the filing and date of hearing of said petition.

Fourth. Proceedings before referee in the claim of the E. F. Grocery Company.

Fifth. Petition of The E. F. Co. in review of referee's opinion and order expunging its claim.

Sixth. Opinion of District Judge, Hon. A. C.

Seventh. Decree filed March 28, 1902.

Eighth. Petition on appeal.

Ninth. Assignment of errors.

Tenth. Allowance of appeal.

Eleventh. Citation and service of same.

Twelfth. Motion of the E. F. Co. to correct entry of March 28th, 1902.

Thirteenth. Entry overruling same.

Fourteenth. Praecipe for transcript.

Fifteenth. Certificate.

And file said transcript with clerk of the United States Circuit Court of Appeals for the —— Circuit.

B. Y.,
Trustee in Bankruptcy.

Dated ——.

(1) As to this practice see Cunningham *vs.* German Ins. Bank, 103 Fed. Rep. 932.

No. 185.

Order that Defendant Deliver to Clerk Exhibit to be Transmitted with the Transcript to the Court of Appeals (1).

[*Caption in Trial Court.*]

This matter coming on to be heard upon the motion of complainant, therefor, after hearing counsel, on motion of R. X., Esq., solicitor and of counsel for complainant, it is ordered that the defendants in this cause, produce and deliver to the clerk of this court, the original trust deed marked "Exhibit 1," which was produced and offered in evidence at the taking of proofs and hearing of said cause; and that the same be transmitted by the clerk of this court with the record of this case on appeal to the Circuit Court of Appeals, for inspection at the hearing and determination of said cause, and that the same be returned to defendants forthwith after said hearing.

(1) R. S. sec. 698. Original papers can be transmitted to Appellate Court only for inspection and not in lieu of a transcript of them. Smith *vs.* Craig, 100 U. S. 226.

No. 186.

Order to send Exhibits to a Circuit Court of Appeals with Transcript.

[*Caption.*]

On motion of Messrs. X. & X., solicitors for complainant, it is

Ordered that in addition to the transcript of the record on appeal in this suit that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, the following original exhibits in this suit to be by him safely kept and returned to this court upon the final determination of the appeal in this suit in said Court of Appeals, viz.:

[*Here name exhibits to be transmitted.*]

No. 187.

Order to Send Exhibits to Circuit Court of Appeals.

[*Caption in District Court.*

It is ordered by the court that all original exhibits produced or used at the hearing of the motion for a preliminary injunction in the District Court be forwarded to the clerk of the United States Circuit Court of Appeals for the —— Circuit at ——, to be used on the hearing of said cause in said Court of Appeals.

No. 188.

Stipulation that Printed Record May be Certified as Transcript

The District Court of the United States

For the —— District of —— Division—In Equity.

The A. B. Company, Complainant,

vs.

C. D. and E. F.,

Doing Business as the C. D. Company, Defendants.

In the above entitled cause it is stipulated that the foregoing printed volume may be, by the clerk of the District Court, returned to the Circuit Court of Appeals as and for the transcript upon the appeal in this cause.

Dated ——.

X. & X.,
Solicitors for Complainant.

R. Y.,
Solicitor for Defendants.

No. 189.

Stipulation to use Printed Records on a Former Writ of Error.

[*Caption.*]

It is agreed by counsel for both sides that this case was heard on being remanded to the record on which it was heard in this court on the former appeal by the A. B. Company, with the addition of certain letters now shown in the transcript as written by Harrison & Dortch, agents of said company, to the said company and its special agent, Kimball, from December 6th, 1896, to January 5th, or 6th, 1897; and it has heretofore been agreed, and is agreed, that the printed record in this court may be used upon this appeal, up to the action of the court in taking the case from the jury on the completion of the hearing, and that the said letters, the said action of the court, and the exceptions filed to such action only need to be printed upon this appeal; the record in this case on this appeal is the same as the record on the former appeal, with the exception of said letters introduced as evidence below, the said action of the court, and the exceptions made thereto by the plaintiffs below.

R. X.,
Attorney for Appellant.
R. Y.,
For Appellees.

No. 190.

Order Extending Time Within Which to File Record in Appellate Court (1).

[*Caption.*]

For satisfactory reasons appearing to the court the time for filing the record in this cause in the Circuit Court of Appeals, pursuant to the appeal sued out, is extended until the —— day of ——.

(1) This order should be filed in trial court and sent to Appellate Court

No. 191.

Appearance of U. S. in Circuit Court of Appeals Without Citation.

United States Circuit Court of Appeals
For the —— Circuit.

A. B., *et al.*, Appellants,
vs.
The United States of America, Appellee. } No. ——.

The United States come into court and say that there is no error either in the record or proceedings, or in the giving of the judgment aforesaid, and pray that the said Circuit Court of Appeals may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

H. C.,
United States Attorney
For the United States, Appellees.

No. 192.

Motion to Dispense with Printing Record (1).

[*Caption.*]

Now comes the appellant [*or* plaintiff in error] and moves the court for leave to prosecute his appeal [*or* writ of error] in this court without printing the record in accordance with the rules of this court.

R. X.,
Attorney for Appellant.

(1) It has been the practice in the Circuit Courts of Appeals to permit a writ of error to be prosecuted *in forma pauperis*, as provided by the Act of Congress of July 20, 1892, 27 Stat. at L. 252; Volk *vs.* Sturtevant Co., 99 Fed. Rep. 532, 39 C. C. A. 647; Wickelman *vs.* A. B. Dick Co., 85 Fed. Rep. 851, 29 C. C. A. 436; Reed *vs.* Pennsylvania Co., 111 Fed. Rep. 714, 49 C. C. A. 572. But see *in re* Presto, 93 Fed. Rep. 522, 35 C. C. A. 394. The Supreme Court in Gallaway *vs.* Fort Worth Bank, 186 U. S. 177, held that

a writ of error could not be prosecuted, without giving bond as required by R. S. sec. 1000, under the Act of Congress of July 20, 1892, *supra*. The effect of this ruling is that the security for costs and deposit for costs in the Appellate Court are not affected by the Act of July 20, 1892. Whether printing the record may be dispensed with is still left to the discretion of the Appellate Court, because the printing is done under a rule of court and not under an act of Congress. It is clear, however, that a poor person cannot claim it as a matter of right under the statute above referred to.

No. 193.

Order to Dispense with Printing Record (1).

[*Caption.*]

Upon motion of the appellant [*or* plaintiff in error] it is hereby ordered that the printing of the record in this court be dispensed with and no deposit made therefor.

(1) See Form No. 192.

No. 194.

Order Granting Leave to use Printed Records in Making up Record in an Appellate Court.

[*Caption.*]

Upon the application of the appellant [*or* plaintiff in error] it is hereby ordered that the clerk of this court may use the records printed in the court below in making the record in this court upon the payment of the usual supervision fee.

No. 195.

Stipulation to Omit Parts of Record in Printing.

The United States Circuit Court of Appeals for the —— District.

A. B., Appellant,
vs.
C. D., Appellee. } No. ——.

In the above cause it is mutually agreed between the parties signing this stipulation that the transcript of the record sent

up by the clerk of the Circuit Court of the United States for the western division of the western district of Tennessee, at Memphis, shall be printed as sent up, except that the following portions thereof may be omitted:

The pages referred to are the manuscript pages of the record:

First. Subpœna in Chancery, p. 53.

Second. Marshal's service of same, p. 54.

Third. Order of continuance, p. 72.

Fourth. Order of continuance, p. 78.

Fifth. Notice of taking depositions, p. 80.

Sixth. Order of continuance, p. 82.

Seventh. Order showing plaintiff's motion to remand, p. 234.

Eighth. Opinion of Hammond, Judge, pp. 235-238.

Ninth. Order of court denying motion to remand, p. 239.

Tenth. Order setting demurrer for hearing, p. 342.

Eleventh. Order setting demurrer for hearing, p. 343.

Twelfth. Order setting demurrer for hearing, p. 344.

Thirteenth. Order setting demurrer for hearing, p. 345.

Fourteenth. Order setting demurrer for hearing, p. 346.

Fifteenth. Oder of continuance, p. 457.

Sixteenth. Notice for taking depositions, p. 478.

Seventeenth. Order of continuance, p. 480.

Eighteenth. Transcript of Record in National Revere Bank *vs.* Potter and others, pp. 481-499.

Nineteenth. Subpœna to answer Cross Bill, p. 546.

Twentieth. Marshal's return of service, p. 547.

Twenty-first. Exhibit "A" to Vogel's deposition, debts due to Hill Shoe Company, pp. 671-693.

Twenty-second. Exhibit "B" to Vogel's deposition, debts due by Hill Shoe Company, and dividends paid, pp. 694-703.

Twenty-third. Exhibit "B" to C. W. Edmonds' deposition being assignment of Mary T. Hill to Edmonds, provided page of the record where the assignment is previously copied is referred to in this connection. Record, pp. 756-760.

Twenty-fourth. Petition of National City Bank of New York, pp. 1035-1036.

Twenty-fifth. Deposition of W. A. Wheatley, pp. 1094-1103.

Twenty-sixth. Deposition of S. L. Moore, pp. 1126-1127.

Twenty-seventh. Order of continuance, p. 1143.

Twenty-eighth. Order of continaunce, p. 1309.

Twenty-ninth. This stipulation.

But the appellees reserve the right to insist hereafter, if material or necessary, that many parts of the record are designated to be printed by the appellants, and agreed to by them for that reason, which are not required for the purpose of the appeal.

Dated ——.

X. & X.
For Appellants.
Y. & Y.
For Appellees.

No. 196.

Writ of Certiorari for Diminution of Record.[1]

United States Circuit Court of Appeals, for the ——Circuit.
United States of America, —— Judicial Circuit, ss.:
The President of the United States of America to the Honorable Judge of the District Court of the United States for the —— District of ——:

Whereas, there is now pending before us a suit in which S. M., receiver of the A. B. Railway Company, and the Merchantile Trust Company are appellants, and C. D., guardian of E. F., and R. H., guardian of G. H., are appellees, which suit was removed into this court by virtue of an appeal from the District Court of the United States for the —— district of ——; and, whereas, it has been suggested to this court that there is a diminution of the record in said cause because the transcript of record in this court does not contain certain record [*here name the papers claimed to be omitted from the transcript*], which were introduced in evidence as alleged.

We being willing that said omission or defect, if any, may be corrected, herewith return such transcript and do command that under your seal, distinctly and openly you send the record and proceedings, with all things concerning the same, as fully and entirely as they remain of record in said District Court of the United States to the United States Circuit Court of Appeals for the —— circuit, together with this writ forthwith.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this —— day of ——, in the year of our Lord one thousand nine hundred and ——, and of the independence of the United States the one hundred and twenty-

[*Seal.*] F. L.,
Clerk of the United States Circuit Court
of Appeals for the —— Circuit.

(1) The Supreme Court is authorized by sec. 716 to issue writs of *certiorari*, (*ex parte* Vallandingham, 1 Wall. 243, 249,) to supply imperfections in a record of a case already before it; and, not like a writ of error, to review the judgment of an inferior court. Luxton vs. North River Bridge Co., 147 U. S. 337; U. S. *vs.* Young, 94 U. S. 258; *ex parte* Gordon, 1 Black 503; Beach Mod. Eq. Prac., sec. 963. See also *ex parte* Hitz, 111 U. S. 766. The Court of Appeals act did not affect this power. Am. Construc. Co. *vs.* Jacksonville Ry. Co., 148 U. S. 380; Sup. Ct. Rule 14.

The Circuit Courts of Appeals are vested by the act creating them with power to grant writs of *certiorari*. Act of March 3, 1891, sec. 12, 26 Stat. at L. 826; Rule 18, C. C. A.; Merrill *vs.* Floyd, 2 C. C. A. 58, 50 Fed. Rep. 849; Blanks *vs.* Klein, 1 C. C. A. 254, 49 Fed. Rep. 1; Randolph *vs.* Allen,

19 C. C. A. 353, 73 Fed. Rep. 23; Burnham *vs.* Ry. Co., 30 C. C. A. 594, 87 Fed. Rep. 168; Dow *vs.* U. S. 27, C. C. A. 42, 81 Fed. Rep. 1004.

The application for writ of *certiorari* to supply an omission or cure a defect in a record should be made to the court in which the case is pending. It is usually made by petition, entitled in the court and cause and addressed to the court. It should state the defect or parts claimed to be omitted, and pray for a writ of *certiorari* to issue. The petition should be signed and verified. If a proper showing is made, the court will ordinarily order a writ to issue, directed to the court below, commanding it to return a true and complete record, including the omitted or defective parts, if any there be. The order also regularly contains a direction to the clerk of the Appellate Court to also return the transcript for the purpose of being corrected. The court will not usually order the alleged omitted portions or the defective portions to be corrected. If the record is faulty it should be made to conform to the record below by certifying the corrections to be made. The Appellate Court will not undertake to make a record in the inferior court.

The writ of *certiorari* is regularly issued under the hand and seal of the clerk of the Appellate Court, and is transmitted to the clerk of the court below, together with the transcript and a copy of the petition, setting forth the alleged defects or omissions in the record. The clerk of the inferior court thereupon compares the transcript with the original record, and returns the writ with a certified correction, or a certified copy of the omitted papers, or with a certificate to the effect that the record is true and complete, or such other facts as may be necessary for a full understanding of the matter. This is to be returned under the seal of the court. It is not necessary to have the return made by the judge. Stewart *vs.* Ingle, 9 Wheat. 526. It is regularly made by the clerk.

A writ of *certiorari* for diminution of the record will not be granted if the application is not made at the first term as required by Supreme Court Rule 14 and Rule 18, C. C. A. See Chappell *vs.* U. S., 160 U. S. 499.

No. 197.

Return to Writ of Certiorari for Diminution of Record.

United States of America, —— District of ——.

In pursuance of the command of the within writ of *certiorari*, I, B. R., clerk of the District Court of the United States, within and for the —— district of —— and the —— division thereof, do herewith transmit, under the seal of said court, a full and complete copy of the records referred to in the

testimony taken before the master appointed in the cause of the Mercantile Trust Company against the C. & D. Railway Company, in the matter of the intervening petitions of E. F., guardian of G. H., and R. S., guardian of F. S., against said railway company, and inadvertently omitted from the record of said cause now pending on appeal in the Circuit Court of Appeals for the —— circuit, and which by the command of said writ were ordered to be returned.

In testimony whereof, I have affixed my signature as clerk of said court and the seal thereof, at ——, in said district, this —— day of ——, Anno Domini ——, and in the —— year of the independence of the United States of America.

[*Seal.*] B. R.,
Clerk of the District Court of the United States for the —— District of ——.

No. 198.

Final Decree or Judgment on Mandate (1).

The District Court of the United States
For the —— District of ——.

A. B.

vs.

C. D.

On reading and filing the mandate of the United States Circuit Court of Appeals for the —— circuit, in this cause, bearing date the —— day of ——, A. D. ——, in obedience to said mandate and in cognizance with the opinion of the said United States Circuit Court of Appeals herein, it is hereby ordered, adjudged and decreed that [*here set out the proper judgment or decree according to the law and facts of the case.*]

CERTIORARI.

No. 199.

Petition for Writ of Certiorari in Bankruptcy.

In the Supreme Court of the United States.
October Term, A. D. 1900.
Arthur E. Mueller, Trustee in Bankruptcy
of Edward B. Nugent, Bankrupt, Petitioner,
vs.
William T. Nugent, Respondent.

Petition for Writ of *Certiorari,* to the United States Circuit Court of Appeals for the Sixth Circuit, Requiring it to Certify to the Supreme Court of the United States, for its Revision and Determination, the Petition for Review in Bankruptcy taken by said W. T. Nugent against Arthur E. Mueller, Trustee in Bankruptcy of Edward B. Nugent, in the Matter of Wayne Knitting Mills, Belding Bros. & Co. and the German Insurance Bank *vs.* Edward B. Nugent, Bankrupt, in Bankruptcy, Lately Depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, filed under the provisions of section 25*d* of the Bankruptcy Act of 1898, respectfully represents as follows:

First. This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question more far-reaching in its importance than the one decided by this court in Bardes *vs.* Bank, 178 U. S., page 524. Upon its determination by this court depends to a large extent the usefulness of said act.

On February 19, 1900, about the hour of 2 o'clock p. m., being more than three hours before a petition, praying for the involuntary adjudication of Edward B. Nugent, bankrupt, was filed, the respondent, W. T. Nugent, son of the bankrupt, received from the bankrupt (Edward B. Nugent), as his agent and as custodian of the fund, money belonging to the bankrupt amounting to $14,233.95. It is nowhere claimed by the one side or relied upon by the other in this controversy that the delivery of said fund to the agent as custodian was a "transfer" or "fraudulent transfer" within the meaning of the case of Bardes *vs.* Bank, 178 U. S., 524.

After the adjudication, certain proceedings in contempt were had against Edward B. Nugent, the bankrupt, looking to the recovery of that fund, but because of the then condition of mind of said bankrupt he was discharged from further attendance about that matter. Upon the petition of the trustee, the referee, to whom the case had been referred, then issued a rule against said W. T. Nugent to show cause, five days after service thereof, why he should not be required to turn over said funds to the trustee. (R., p. 19.) After some months' delay, said W. T. Nugent, having been served with a copy of said order, appeared before the referee in person and by counsel, and without objecting to the time given for response, or that he was improperly or irregularly made a party, filed a response (R., p. 23) to the rule in which he objected only to the jurisdiction of the referee or the court

to issue said rule; and further responded that if he had received the said money, or any part thereof, it was before the petition in bankruptcy was filed. He also responded that by reason of the fact that he was indicted, charged with the offense of receiving said money and retaining the same and aiding and abetting in the retention thereof, after the filing of the petition in bankruptcy, he could not make further response without incriminating himself. Without waiving, but reserving, the jurisdictional question, Nugent then agreed that certain depositions of his father the bankrupt, his sisters and others should be read on the hearing of the response. (R., p. 21.) Nugent offered no proof in his own behalf.

The referee, in order to first determine whether he had jurisdiction, then heard the proof offered by the trustee and found that said Nugent had received said money only as agent and custodian of his father, the bankrupt; that he had not accounted for the same, and that said money belonged at the time of the hearing of the rule to the bankrupt's estate. No additional response was then offered by Nugent. Whereupon the referee then exercised jurisdiction and made said rule absolute and ordered Nugent to pay over the money to the trustee in bankruptcy. (R., p. 21.) Upon his failure to comply with said order, and still without additional response, the referee found him guilty of contempt and certified the case to the judge, with a recommendation that said W. T. Nugent be punished for contempt and committed until he should pay said sum. (R., p. 25.)

The respondent then filed with referee his petition for review, in pursuance of General Order No. 27 of the Supreme Court (R., p. 26), and upon the certification by the referee to the judge, showing the question presented, the summary of the evidence, and the findings and order thereon, according to said General Order 27, and form 56, a hearing was had before him. The referee also certified to the judge the depositions read on the hearing of the case, and same were before the judge.

The judge, after the hearing, rendered an opinion (R., p. 28) in which the finding of the referee was sustained, and said W. T. Nugent, being in court, he was called to the bar to receive sentence; whereupon, at the request of said W. T. Nugent by his counsel, the judge deferred passing sentence for two days. At the expiration of said two days said respondent, by his counsel, tendered an amended response (R., p. 37) in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the funds in question were held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 36); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. In his opinion filed, the judge, in addition to sustaining the findings of fact by the referee above recited, also found from the proof before him the following facts in this language:

"The court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.95, is the property of the bankrupt's estate alone; that it had been taken possession of, and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim or right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee." (R., pp. 30-31.)

In refusing to permit said amended response to be filed, the court entered the following order:

"Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court

not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.

"And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson county, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside this judgment and sentence upon the delivery, payment or satisfaction aforesaid.

"To all of which the respondent, William T. Nugent, excepts." (R., p. 36.)

Thereafter said W. T. Nugent, under section 24*b* of the act, filed a petition in the United States Circuit Court of Appeals for review, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1. 1.)

After hearing said petition for review, said Circuit Court of Appeals, on the 13th day of December, 1900, entered a decree (R., p. 53) reversing and vacating the order of the District Court for the commitment of the respondent, and the order made by the referee upon the respondent to show cause, and the further order of the referee adjudging that said respondent be required to pay to the trustee the moneys alleged to be under his control, as well as the order of the referee adjudging the respondent to be in contempt; and on the same day filed a memorandum opinion (R., p. 54) and issued its forthwith mandate (R., p. 53) in direct contravention of its Rules of Court No. 29 and 32, which are as follows:

29. "A petition for rehearing after judgment can be presented only within thirty days after the day when the printed

opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determine."

32. "In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

" Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that action W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the case. (R., p. 56.)

Second. With the petition for review said W. T. Nugent filed various exhibits containing matters not part of the record in the court below, one of which was a copy of said amended response (R., p. 37), which was not a part of the record or before the referee or judge below, as shown herein above. And said petition for review further contained allegations of fact not in or shown by the record, and not before the District Court or the referee.

Among other things said petition for review contained the following allegations, to wit:

"He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication therein, and that there was no evidence to the contrary, or that he had any of said money on hand or under his control when he was served herein as stated." (R., p. 6, beginning on 25th line.)

As stated, that allegation was never before the referee or the judge of the District Court, nor was it acted upon by them, but was wholly original matter, and not properly a part of the record. All the irrelevant and impertinent matter the trustee moved the Circuit Court of Appeals to expunge from the record, which motion said Court of Appeals failed to sustain or act upon; though it is contended, as appears from the opinion of that court, many of those impertinent matters, and particularly said so-called amended response, were relied upon.

Third. The Supreme Court, in Bardes *vs.* Bank, 178 U. S., 524, has decided that, except with the consent of the proposed defendant, the District Court has no jurisdiction to entertain an independent suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party, in possession of and *claiming the property "as his own,"* and which transfer is *alleged to have been fraudulent as against creditors.* Except as to suing a debtor, that is all that said case does decide.

But, upon authority of that decision, the Circuit Court of Appeals has held that the District Court, which included the referee, has no jurisdiction, by summary process or rule, to compel a mere custodian of the property of a bankrupt to deliver the same to a trustee in bankruptcy when the elements of a fraudulent transfer did not exist, nor were alleged; and that, too, even though it be conceded that the legal title of said property was in the bankrupt and is vested by the Bankrupt Act in the trustee; and, too, when the custodian is asserting

no adverse title to the property; and, further, the Court of Appeals has decided that where a party makes a general assignment for the benefit of creditors, and by reason thereof is adjudged a bankrupt, the trustee in bankruptcy can not recover the property of the bankrupt from the assignee by summary process, notwithstanding the deed of assignment is made void by the adjudication in bankruptcy; but he must resort to an independent action unless there be jurisdiction upon other grounds than those arising under the bankruptcy law.

And the Court of Appeals has in effect held that the referee may not by summary procedure inquire into the nature of the custodian's holding, to ascertain if it be adverse or not; and it has further held that, though the custodian fails to assert any adverse claim, and the proof shows his holding to be amicable, the referee is nevertheless without jurisdiction to compel him to surrender the property to the trustee. These rulings it is contended are not warranted by Bardes *vs.* Bank, *supra.*

It is to review the rulings of the Circuit Court of Appeals on these questions that this petition for a writ of *certiorari* is applied for. The questions are of paramount importance, because, unless that decision of the Court of Appeals is reversed or materially modified, the power of the Bankruptcy Court under section 2 (6), (7) and (13) of the act to bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy, to cause the estate of bankrupts to be collected, reduced to money and distributed, to determine controversies in relation thereto, and to enforce obedience by bankrupts and other persons, will be almost, if not entirely, rendered nugatory.

The question in this case is not as it was in Bardes' case, whether the District Court has jurisdiction to entertain a plenary and independent suit, brought by a trustee in bankruptcy against a citizen of the same state to recover assets, the title of which is in dispute; but the question involved is

this: Can the District Court by rule compel an agent or custodian for the bankrupt or for the court, who has the mere naked possession of the bankrupt's estate, claiming no interest therein, and asserting no title thereto, to deliver such property to the trustee? Or must the trustee be compelled to resort to an ordinary action and the expense and delays incident thereto in another court to obtain possession of such property from such a custodian? Or does not the bankruptcy law provide means for the speedy and economical administration of the estate, and does not section 2 with its sub-sections exactly cover just such cases as this?

Your petitioner, with all due respect, maintains that the case of Bardes *vs.* Bank, *supra,* is not susceptible of the constructions placed upon it by the Court of Appeals, and was evidently not so intended by this court; and therefore under that authority, the Court of Appeals erred when it held, as it did in effect, that under no circumstances can the possession of property be recovered, except by an independent, plenary, dilatory and expensive suit in some other court.

Your petitioner contends that, on the contrary, the District Court has jurisdiction by summary process to require the custodian of property belonging to the bankrupt's estate, to deliver the same to the trustee, unless said custodian is holding the property adversely or claiming, in good faith, title, or at least colorable title, to said property; that the custodian is the agent or trustee of the court holding such property, and can by a rule be compelled to deliver it over to the trustee; that the mere naked possession of property without claim of title or color of title, is not sufficient to put the case at bar within the principles of the Bardes case. In fact, this court, in stating the question decided in the Bardes case, laid stress upon the point that the third party, from whom it was sought to recover the property, was holding it adversely; and that adverse holding was the foundation upon which this court based that opinion.

After diligent search petitioner has been unable to find any

definition of "adverse possession" which does not contemplate the holding by some claim or color of title.

The petition for review filed in the Court of Appeals gave that court only the power to review matters of law. (*In re* Purvine, 5th Circuit Court of Appeals, 96 Fed., 192.) And the Circuit Court of Appeals in this circuit has so declared in Cunningham *vs.* German Insurance Bank, 103 Fed., 932, and has further decided that only such matters as were acted upon by the court below could be reviewed.

So that upon the record, disregarding the impertinent matter as it reached the District Court and Circuit Court of Appeals, it was conclusively established, as matter of fact, that W. T. Nugent received said funds only as the agent or custodian of the bankrupt; that at no time until after the rendition of the opinion by the District Judge was he asserting any claim or right to or ownership in said fund; consequently the cold question of law was before the Court of Appeals as to whether or not the referee or the District Court had power by rule to compel such a custodian, claiming no title in the property, to deliver it to the trustee.

Fourth. This court, in the case of White *vs.* Schloerb, 178 U. S., 542, decided that a judge of the Bankruptcy Court may compel a sheriff to return goods to the judicial custody of his court, seized and taken therefrom by a sheriff in replevin proceedings.

The petitioner contends that in the case at bar, the agent's custody, being amicable and without adverse claim, placed the agent in the attitude of the sheriff in the White *vs.* Schloerb case; and there being no adverse claim at the time of the adjudication, trial and decision by the referee and judge, the property could not be lifted from the judicial custody by any adverse claim thereafter made.

Nugent's taking or holding the money as custodian was continuous from the moment he received it until he was ordered to pay it over; and it was at all times a holding for

the benefit of the bankrupt, and hence for the court and its officer, the trustee. There never was a break in that continuity.

In the case of *in re* Rosser, 101 Fed., 562, the Eighth Circuit Court of Appeals has held that upon adjudication all the property of the bankrupt is placed in *custodia legis,* and that the bankrupt and every other party who has the possession or control of any part of it, holds that part as agent and trustee of the court and its officer.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on Marshall *vs.* Knox, 16 Wall., 551, used this language:

"In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy has no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no

adverse claim or title thereto; but, in the words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt." The District Courts in Vermont, New York and West Virginia, which decisions are the law in those districts respectively, have also sustained the right to issue such rules. (*In re* Brooks, 91 Fed., 518; *in re* Raymond W. Kenney, 95 Fed., 427; *in re* Moore, 104 Fed., 869.) Then, too, it is contended the opinion of the Court of Appeals is in conflict with White *vs.* Schloerb, 178 U. S., 542.

In re Ward, 104 Fed., 985, it was sought to obtain an injunction against one O'Donald from disposing of certain "funds and credits due" to the bankrupt and which were in the possession of the said O'Donald. Judge Lowell, of the Massachusetts district, basing his opinion upon the case of Bardes *vs.* Bank refused to grant the injunction, and commenting on the cases of Bardes *vs.* Bank and White *vs.* Schloerb, closes his opinion with the following language:

"It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court, and if counsel for the petitioners shall desire to take this case directly to the Supreme Court, as is provided by section 5 of the Judiciary Act of 1891, 26 Stat., 827, I will gladly facilitate proceedings to that end."

And so it is that your petitioner contends that by reason of the decision in the case at bar, and the others so cited, there is a contrariety of opinion, and not a uniform administration of the Bankruptcy Act (as necessary as uniformity in the act itself, required by section 8, sub-section 4, Article I., of the constitution of the United States) as to the grave and important question, to wit: The right of the court of bankruptcy to summarily order in property which is admittedly assets of

a bankrupt's estate and which the holder thereof is not claiming as his own.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case therein, entitled "The Wayne Knitting Mills, Belding Brothers & Company and the German Insurance Bank, against E. B. Nugent, bankrupt, on petition of W. T. Nugent for review, No. 920," to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by said W. T. Nugent to that court in bankruptcy.

And your petitioner will ever pray.

William W. Watts,
John Richard Watts,
Counsel for Petitioner.

State of Kentucky, }
Jefferson County, } Sct.

William W. Watts, being duly sworn, says that he is one of the counsel for Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, bankrupt, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes. William W. Watts.

Subscribed and sworn to before me this 29th day of January, A. D. 1901. My commission as Notary Public expires on the 12th day of January, A. D. 1904.

E. B. Kerr,
[*Seal.*] Notary Public within and for County of Jefferson, State of Kentucky.

(1)Taken from the record in Nugent *vs.* U. S., 184 U. S. 1. See Loveland on Bankruptcy, sections 307 and 308.

THE

UNITED STATES BANKRUPTCY LAW,

1898.

As Amended February 5, 1903, 32 Stat. at L. 797.

(Sections amended are inclosed in brackets [], amendments and new sections are printed in *italics.*)

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CHAPTER I.

DEFINITIONS.

Section 1. Meaning of words and phrases. *a* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) **"A person against whom a petition has been filed."** "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) **"Adjudication."** "Adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed;

(3) **"Appellate courts."** "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) **"Bankrupt."** "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who

has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) **"Clerk."** "Clerk" shall mean the clerk of a court of bankruptcy;

(6) **"Corporations."** "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) **"Court."** "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) **"Courts of bankruptcy."** "Courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) **"Creditor."** "Creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) **"Date of bankruptcy"; "bankruptcy," etc.** "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) **"Debt."** "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(12) **"Discharge."** "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) **"Document."** "Document" shall include any book, deed, or instrument in writing;

(14) **"Holiday."** "Holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) **When deemed "insolvent."** A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his

creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) "Judge." "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) "Oath." "Oath" shall include affirmation;

(18) "Officer." "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(19) "Persons." "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;

(20) "Petition." "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) "Referee." "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) "Conceal." "Conceal" shall include secrete, falsify, and mutilate;

(23) "Secured creditor." "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) "States." "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) "Transfer." "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) "Trustee." "Trustee" shall include all of the trustees of an estate;

(27) **"Wage-earner."** "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) **Words in masculine gender.** Words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) **Importing plural.** Words importing the plural number may be applied to and mean only a single person or thing;

(30) **Importing singular.** Words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

Section 2. **U. S. district courts; supreme court, D. C.; Territorial courts; jurisdiction.** That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) **To adjudge bankrupt.** Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) **Allow and disallow claims, etc.** Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) **Appoint receivers, etc.** Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) **Try and punish bankrupts, etc.** Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) **To permit temporary transaction of business.** [Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates;]

(5) *Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services;*

(6) **To substitute additional persons in proceedings, etc.** Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) **To collect and distribute assets.** Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) **To close estates.** Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) **To confirm or reject compositions.** Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) **To confirm, etc., referee's findings.** Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

(11) **Determine exemptions.** Determine all claims of bankrupts to their exemptions;

(12) **Discharge bankrupts, etc.** Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) **Enforce orders.** Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) **Extradite bankrupts.** Extradite bankrupts from their respective districts to other districts;

(15) **Make orders.** Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) **Punish for contempt.** Punish persons for contempts committed before referees;

(17) **Appoint trustees.** Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) **Tax costs.** Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and

(19) **Transfer cases.** Transfer cases to other courts of bankruptcy.

Unspecified powers. Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

Section 3. Acts of bankruptcy; of what to consist. *a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his cred-

itors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or [(4) made a general assignment for the benefit of his creditors;] *or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;*
or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Petition to be filed within four months. *b* A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after

(1) **From when to date.** The date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

Defense of solvency. *c* It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed,

Burden of proof. And under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

Person denying insolvency; to testify. *d* Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be

his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency,

Burden of proof, etc. And in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

Petitioner to give bond. *e* Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment,

Liability for costs, etc. In case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

Allowance of costs, etc. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property.

Counsel fees, etc., to be fixed by court. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Section 4. Who may become voluntary bankrupt. *a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

Who may become involuntary bankrupt. [*b* Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.]

b Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States.

Section 5. Partners; partnership. *a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

Administration of estate. *b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

Jurisdiction over one partner sufficient. *c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

Trustee's duty. *d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

Expenses. *e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

Payment of partnership debts. *f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.

Surplus of individual property. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts.

Surplus of partnership property. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

Claims of partnership against individual estates, etc. *g* The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

Administration of estate where all partners are not bankrupt. *h* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Section 6. Exemptions of bankrupts. *a* This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Section 7. Duties of bankrupts. *a* The bankrupt shall

(1) **Attend meetings.** Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) **Comply with orders.** Comply with all lawful orders of the court;

(3) **Examine proofs of claims.** Examine the correctness of all proofs of claims filed against his estate;

(4) **Execute papers.** Execute and deliver such papers as shall be ordered by the court;

(5) **Execute transfers.** Execute to his trustee transfers of all his property in foreign countries;

(6) **Inform trustee.** Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) **Disclose false claims.** In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) **Prepare schedule of property.** Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) **Submit to examination.** When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Bankrupt, when not compelled to attend meeting; examine claims. *Provided, however*, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown,

Expenses for attending meetings. And the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Section 8. Death or insanity of bankrupts; not to abate proceedings. *a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane:

Widow entitled to dower, etc. *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Section 9. **Protection and detention of bankrupts; exemption from arrest.** *a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

Detention for purposes of examination. *b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination.

May be kept in custody ten days, etc. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 10. **Extradition of bankrupts.** *a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

Section 11. **Suits by and against bankrupts; stay until adjudication.** *a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition;

Further stay. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

Appearance of trustee. *b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

Commenced prior to adjudication. *c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

Time for bringing suits by or against trustees. *d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Section 12. Compositions, when confirmed; when may be offered. *a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

Application for confirming. *b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

Date, etc., for hearing. *c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

Conditions of confirmance. *d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

Distribution of consideration. *c* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

Section 13. Compositions, when set aside; upon practice of fraud. *a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Section 14. Discharges, when granted; application for. *a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

Hearing of application. [*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.]

b The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has (1) *committed an offense punishable by imprisonment as herein provided; or* (2) *with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or* (3) *obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or* (4) *at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his prop-*

erty with intent to hinder, delay, or defraud his creditors; or (5) *in voluntary proceedings been granted a discharge in bankruptcy within six years; or* (6) *in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.*

Confirmation discharges from debts. *c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Section 15. Discharges, when revoked. *a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Section 16. Co-debtors of bankrupts; liability not affected by bankrupt's discharge, etc. *a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

[**Section 17. Debts not effected by a discharge.** *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) **U. S. and State taxes.** Are due as a tax levied by the United States, the State, county, district, or municipality in which he resides;

(2) **Judgments in actions for frauds, etc.** Are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;

(3) **Claims not scheduled, etc.** Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) **Created by fraud, etc.** Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.]

Section 17. Debts not affected by a discharge—*a A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as* (1) *are due as a tax levied by the United States, the state, county, district, or municipality in which he resides;* (2) *are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;* (3) *have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or* (4) *were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.*

CHAPTER IV.

Courts and Procedure Therein.

Section 18. Process, pleadings, and adjudications; service of petition, involuntary bankruptcy. [*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall

Returnable in fifteen days. Be returnable within fifteen days, unless the judge shall for cause fix a longer time;

By publication. But in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.]

a Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall

otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.

Pleading within ten days. [*b* The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.]

b The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.

Verification. *c* All pleadings setting up matters of fact shall be verified under oath.

Court to determine issues when facts controverted. *d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

Decision where pleadings not filed. *e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

If judge absent, case to be referred to referee. *f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

Hearing on filing voluntary petition. *g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.

Absence of judge. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Section 19. Jury trials; person against whom involuntary petition filed, entitled. *a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein other-

wise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed.

Right waived. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

Attendance of jury, etc. *b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

Laws as to jury trials applicable. *c* The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Section 20. Oaths, affirmations; by whom administered. *a* Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

Affirmations. *b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Section 21. Evidence; compulsory attendance of witnesses. [*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.]

a A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the

acts, conduct, or property of a bankrupt whose estate is in process of administration under this act; provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Depositions, laws governing. *b* The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

Notice of taking. *c* Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

Certified copies of proceedings evidence. *d* Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

Of order approving trustees' bond. *e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

Of order confirming composition, etc. *f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

Evidence of revesting title in bankrupts. *g* A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Section 22. Reference of cases after adjudication. *a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited au-

thority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

Transfer of case to different referee. *b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Section 23. Jurisdiction of the United States and State courts. *a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

Suits by trustees, where brought. [*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.]

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.

Concurrent jurisdiction of circuit courts and courts of bankruptcy. *c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Section 24. Jurisdiction of appellate courts. *a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

Appeals from courts not in organized circuits and in District of Columbia. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any

organized circuit of the United States and from the supreme court of the District of Columbia.

Jurisdiction of circuit court of appeals. *b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Section 25. Appeals and writs of error; when taken. *a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

To be within ten days; hearing. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Appeal to U. S. Supreme Court. *b* From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. **Where amount exceeds $2,000, etc.** Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. **Where question certified by Supreme Court Justice.** Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

Trustees not to give bond. *c* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

Certification to Supreme Court by courts. *d* Controversies

may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Section 26. Arbitration of controversies; trustees may submit to. *a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

Selection of arbitrators. *b* Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

Findings of arbitrators. *c* The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Section 27. Compromises. *a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Section 28. Designation of newspapers to publish notices. *a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Section 29. Offenses; penalty for misappropriating property, etc. *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

Concealing property. *b* A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction

of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) **False oath or account, etc.** Made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) **Presenting false claim.** Presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) **Receiving property from bankrupt.** Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) **Extorting money for forbearing to act, etc.** Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

Acting as referee when interested. *c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or

(2) **Purchasing property, etc.** Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) **Refused to permit inspection of accounts.** Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do.

Prosecutions to be in one year. *d* A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Section 30. Rules, forms, and orders; United States Supreme Court to make. *a* All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

Section 31. Computation of time. *a* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy,

the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Section 32. Transfer of cases in different courts. *a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

Officers, their Duties and Compensation.

Section 33. Creation of two offices, referee and trustee. *a* The offices of referee and trustee are hereby created.

Section 34. Appointment, removal, and districts of referees. *a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and

(2) **Designation of districts.** Designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Section 35. Qualifications of referees. *a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Section 36. Oath of office of referees. *a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Section 37. Number of referees. *a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Section 38. Jurisdiction of referees. *a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) **To consider petitions.** Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) **Administer oaths, examine witnesses, etc.** Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) **Take possession and release property, etc.** Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) **Perform certain duties of bankruptcy courts.** Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) **Authorize employment of stenographers.** Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Section 39. Duties of referees. *a* Referees shall

(1) **Declare dividends.** Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) **Examine schedules, etc.** Examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) **Furnish information, etc.** Furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;

(4) **Give notices.** Give notices to creditors as herein provided;

(5) **Prepare records, etc.** Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) **Prepare schedules, etc.** Prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) **Preserve records, etc.** Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) **Transmit papers to clerks, etc.** Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) **Preserve evidence, etc.** Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) **Obtain papers, etc.** Whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

Referees not to act if interested. *b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Section 40. Compensation of referees. [*a* Referees shall receive as full compensation for their services, payable after they are

rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.]

a Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

On transfer from one to another. *b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

Where reference revoked. *c* In the event of the reference of a case being revoked before it is concluded, and when the case is especially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Section 41. Contempts before referees. *a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

When witness not required to attend. *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

Contempt proceedings; penalty. *b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Section 42. Records of referees; manner of keeping. *a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

Books to be certified and transmitted to court. *c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Section 43. Referee's absence or disability; filling vacancy. *a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Section 44. Appointment of trustees. *a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Section 45. Qualifications of trustees. *a* Trustees may be (1) individuals who are respectively competent to perform the duties

of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Section 46. Death or removal of trustees; suits not to abate, etc. *a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Section 47. Duties of trustees. *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) **Collect money, etc.** Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest;

(3) **Deposit money, etc.** Deposit all money received by them in one of the designated depositories;

(4) **Disburse money; how.** Disburse money only by check or draft on the depositories in which it has been deposited;

(5) **Furnish information.** Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) **Keep accounts.** Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) **Detailed statements to creditors.** Lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) **Make final reports.** Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) **Pay dividends.** Pay dividends within ten days after they are declared by the referees;

(10) **Report condition of estates.** Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts,

within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) **Exemptions.** Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

Concurrence of two out of three necessary. *b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

File adjudication in recorder's office. *c The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.*

Section 48. Compensation of trustees; fee. [*a* Trustees shall receive as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt,

Commissions. And from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.]

a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five

hundred dollars or less, four per centum on moneys in excess of five hundred dollars, and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

Apportionment where more than one. *b* In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

Withholding of. *c* The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

Section 49. Accounts and papers of trustees. *a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Section 50. Bonds of referees and trustees. *a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

Of trustees. *b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

Of new trustee, etc.; amount may be increased. *c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office

of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

Surety's property, value. *d* The court shall require evidence as to the actual value of the property of sureties.

Two necessary. *e* There shall be at least two sureties upon each bond.

Excess of property. *f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

Corporations may be. *g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

Filing of bonds. *h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

Bond, trustee's liability. *i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

Joint. *j* Joint trustees may give joint or several bonds.

Failure to give creates vacancy. *k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

Suits upon referees'. *l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

Suits upon trustees'. *m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Section 51. Duties of clerks. *a* Clerks shall respectively

(1) **To account.** Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) **Collect fees, etc.** Collect the fees of the clerk, referee,

and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) **Deliver papers to referee, etc.** Deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) **Pay referee.** And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

Section 52. Compensation of clerks and marshals. *a* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

Of marshals. *b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Section 53. Duty of Attorney-General to report annually. *a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

Section 54. Statistics of bankruptcy proceedings. *a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

Section 55. Meetings of creditors. *a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

Presiding officer, duties. *b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

Creditors' duty. *c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

Subsequent meetings of. *d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

Call of meeting by court. *e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

Final meeting. *f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Section 56. Voters at meetings of creditors. *a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

Holders of secured claims not entitled, etc. *b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Section 57. Proof and allowance of claims; of what to consist. *a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

When founded upon a writing. *b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

After proved, may be filed. *c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

Allowance of claims, etc. *d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

Claims of secured creditors, etc. *e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or prior-

ities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

Claims, hearing objections. *f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

Preferred claims. [*g* The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.]

g The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.

Value of securities held by secured creditors, etc. *h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

Claims secured by individual undertaking. *i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

Penalty, forfeiture, debts due as, allowance. *j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Reconsideration of claims. *k* Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

Recovery of dividend. *l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a divi-

dend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

Claims of one bankrupt against another. *m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

Time for proving claims. *n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment:

Of infants, etc. *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Section 58. Notices to creditors; unless waived, etc. *a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

Of first meeting. *b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting.

Other notices. Other notices may be published as the court shall direct.

By referee. *c* All notices shall be given by the referee, unless otherwise ordered by the judge.

Section 59. Petition, who may file as voluntary bankrupt. *a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

Involuntary. *b* Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

To be in duplicate. *c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

Notice to creditors not joined in petition. *d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard;

Hearing of case, etc.; when dismissed. If upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

Creditors, computing number of. *e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

Appearance of. *f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

Notice of dismissal. *g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

Section 60. Preferred creditors. [*a* A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any

one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.]

a A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

Preference, when given; voidable. [*b* If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.]

b If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Preferred creditor giving further credit; set off of new credit. *c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

Payments to attorneys, etc.; re-examination of. *d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

Section 61. Depositories for money. *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees,

Bond. And shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

Section 62. Expenses of administering estates; report and approval. *a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Section 63. Debts which may be proved. *a* Debts of the bankrupt may be proved and allowed against his estate which are

(1) **Fixed liability.** A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) **Costs of suit due, etc.** Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) **Costs incurred before filing petition.** Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) **On open account.** Founded upon an open account, or upon a contract express or implied; and

(5) **Judgments, etc.** Founded upon provable debts reduced to judgments after the filing of the petition and before the consid-

eration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

Allowances of unliquidated claims. *b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Section 64. Debts which have priority; taxes. *a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

Order of payment. *b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) **Cost of preserving estate.** The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) **Filing fees.** [The filing fees paid by creditors in involuntary cases;]

(2) *The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.*

(3) **Cost of administration, etc.** The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) **Wages of workmen, etc.** Wages due to workmen, clerks, *travelling or city salesmen*[1] or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and

(1) The words in italics were added by the act of June 15, 1906.

(5) **Owing to person entitled to priority, etc.** Debts owing to any person who by the laws of the States or the United States is entitled to priority.

Payment of claims accruing after composition set aside or discharge revoked. *c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Section 65. Dividends, declaration and payment on allowed claims. *a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

Declaration of first. [*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims.

Subsequent. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.]

b The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order; provided, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: .And provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared.

Creditors receiving, not affected by proof of subsequent claims, etc. *c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

Preference of certain creditors. *d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

Limit to claimant's right to collect. *e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

Section 66. Unclaimed dividends; after six months paid into court. *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

After one year, distributed. *b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt:

Of minors. *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

Section 67. Liens; unrecorded claims not. *a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

Trustee subrogated to rights of creditor. *b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

Lien, judgment, etc.; created within four months, to be dissolved. *c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) **If defendant were insolvent.** It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) **Knowledge of.** The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) **Through fraud.** That such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved,

Trustee subrogated, etc. But the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

Liens given in good faith, etc. *d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

Conveyances, etc., subsequent to act and within four months of petition; to defraud, etc., void. *e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and

within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration,

Property remains part of assets. And all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings or otherwise for the benefit of the creditors.

Conveyances, etc., within four months of petition; void under state laws; void under this act. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

Liens, etc., created through legal proceedings; void, etc. *f* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same,

Property passes to trustee. And shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attach-

ment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid.

Court may order conveyances; purchaser for value. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Section 68. Set-offs and counterclaims; allowed. *a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

Not allowed. *b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Section 69. When property may be seized; possession of property. *a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders.

Bond of indemnity. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained.

Released on giving bond. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the

trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Section 70. **Title to property.** *a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification,

Vested in trustee. Shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all

(1) **Documents.** Documents relating to his property;

(2) **Patents, etc.** Interests in patents, patent rights, copyrights, and trade-marks;

(3) **Certain powers.** Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

(4) **Transferred in fraud.** Property transferred by him in fraud of his creditors;

(5) **Which might have been transferred, etc.** Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

Policy of insurance. *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) **Rights of action upon contracts.** Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

Appraisal of property. *b* All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court.

Sale for not less than seventy-five per centum of appraised

value. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

Trustee to convey title. *c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

Vesting title on; setting composition aside. *d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

May avoid certain transfers, etc. *e* The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

Recovery of property. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbeforefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

Title revested on confirming composition. *f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

The Time When This Act Shall Go Into Effect.

Force and effect; petition for voluntary bankruptcy; involuntary. *a* This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

Cases pending under State laws. *b* Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Section 71. Clerks to keep indexes and make searches, etc. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts; provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.*

Section 72. No additional fees to referees or trustees. *That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.*

Section 19.* *That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*

* This is section 19 of the amendatory act of February 5, 1903, 32 Stat. at L., 797.

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THE ACT OF 1867.

The Bankruptcy Law of 1867.[1]

CHAPTER ONE.

COURTS OF BANKRUPTCY, THEIR JURISDICTION, ORGANIZATION, AND POWERS.

Scope of the jurisdiction of courts of bankruptcy. SEC. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement

[1] The text is taken from the Revised Statutes of the United States, edition of 1878. The original act of 1867 was passed March 2, 1867 (14 Stat. at L. 517) and the principal amendment to this act was passed June 22, 1874 (18 Stat. at L. 178). Contemporaneously with the passage of the amendatory act of June 22, 1874, amending by specific reference the bankrupt act of 1867, congress enacted a complete substitute for the act, as Title sixty-one of the statutes, and repealed the act in common with other general and permanent acts. The amendatory act has been incorporated in the revised edition of the statutes of 1878 and will therefore be included in the text. (See preface to edition of 1878). The effect of passing the amendment and the revised statutes on the same day caused some confusion in construing them. See In re Oregon Bul. Printing & Pub. Co. No. 10558 Fed. Cas., S. C. 13 N. B. R. 199; In re Townsend 2 Fed. Rep. 559; Brown *v.* White 16 Fed. Rep. 200. A list of all the amendatory acts may be found on Page 12 *ante*.

This statute was repealed by the act of June 7, 1878, to take effect Sept. 1, 1878, 20 Stat. at L. 99.

of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Authority of district courts and judges. SEC. 4973. The district courts shall be always open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their powers and jurisdiction as such courts shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

Sessions of the district courts. SEC. 4974. A district court may sit for the transaction of business in bankruptcy, at any place within the district, of which place and of the time of commencing session the court shall have given notice, as well as at the places designated by law for holding sessions of such court.

Power of district courts to compel obedience. SEC. 4975. The district courts as courts of bankruptcy shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Powers of circuit judge during absence, sickness, or disability of district judge. SEC. 4976. In case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Powers of the supreme court for the District of Columbia. SEC. 4977. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme court of the District of Columbia, when the bankrupt resides in that District.

Powers of the supreme courts for the Territories. SEC. 4978. The same jurisdiction, power, and authority which are hereby conferred upon the district courts in cases of bankruptcy are also conferred upon the supreme courts of the several Territories when the bankrupt resides in either of the Territories. This jurisdiction may be exercised, upon petitions regularly filed in such courts, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides.

Jurisdiction of actions between assignees and persons claiming adverse interests. SEC. 4978. The several circuit courts shall have within each district concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming

an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee.

Appeals to circuit court. SEC. 4980. Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this Title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

How taken. SEC. 4981. No appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from; nor unless the appellant at the time of claiming the same shall give bond in the manner required in cases of appeals in suits in equity; nor shall any writ of error be allowed unless the party claiming it shall comply with the provisions of law regulating the granting of such writs.

How entered. SEC. 4982. Such appeal shall be entered at the term of the circuit court which shall be held within the district next after the expiration of ten days from the time of claiming the same.

Waiver of appeal. SEC. 4983. If the appellant, in writing, waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken.

Appeal from decision rejecting claim. SEC. 4984. A supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceeding shall thereupon be had in the pleadings, trial, and determination of the cause, as in actions at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to a creditor.

Costs. SEC. 4985. The final judgment of the circuit court, rendered upon any appeal provided for in the preceding section, shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they are to be allowed out of the estate.

Power of general superintendence conferred on circuit court. SEC. 4986. The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time, or, in vacation, by the circuit justice or by the circuit judge of the circuit.

Superintendence by supreme courts of Territories. SEC. 4987. The several supreme courts of the Territories shall have the same general superintendence and jurisdiction over the acts and decisions of the justices thereof in cases of bankruptcy as is conferred on the circuit courts over proceedings in the district courts.

Power of district judge in a district not within any organized circuit. SEC. 4988. In districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.

Appeal and writ of error to Supreme Court. SEC. 4989. No appeal or writ of error shall be allowed in any case arising under this Title from the circuit court to the Supreme Court, unless the matter in dispute in such case exceeds two thousand dollars.

Supreme Court may prescribe rules. SEC. 4990. The general orders in bankruptcy heretofore adopted by the justices of the Supreme Court, as now existing, may be followed in proceedings under this Title; and the justices may, from time to time, subject to the provisions of this Title, rescind or vary any of those general orders, and may frame, rescind, or vary other general orders, for the following purposes:

First. For regulating the practice and procedure of the district courts in bankruptcy, and the forms of petitions, orders, and other proceedings to be used in such courts in all matters under this Title.

Second. For regulating the duties of the various officers of such courts.

Third. For regulating the fees payable and the charges and costs to be allowed, except such as are established by this Title or by law, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

Fourth. For regulating the practice and procedure upon appeals.

Fifth. For regulating the filing, custody, and inspection of records.

Sixth. And generally for carrying the provisions of this Title into effect.

All such general orders shall from time to time be reported to Congress, with such suggestions as the justices may think proper.

What constitutes commencement of proceedings. SEC. 4991. The filing of the petition for an adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, shall be deemed to be the commencement of proceedings in bankruptcy.

Records of bankruptcy proceedings. SEC. 4992. The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be presumptive evidence of the facts therein stated.

Registers in bankruptcy. SEC. 4993. Each district judge shall appoint, upon the nomination and recommendation of the Chief Justice of the Supreme Court, one or more registers in bankruptcy, when any vacancy occurs in such office, to assist him in the performance of his duties, under this Title, unless he shall deem the continuance of the particular office unnecessary.

Who are eligible. SEC. 4994. No person shall be eligible for appointment as register in bankruptcy, unless he is a counselor of the district court for the district in which he is appointed, or of some one of the courts of record of the State in which he resides.

Qualification. SEC. 4995. Before entering upon the duties of his office, every person appointed a register in bankruptcy shall give a bond to the United States, for the faithful discharge of the duties of his office, in a sum not less than one thousand dollars, to be fixed by the district judge, with sureties satisfactory to such judge; and he shall, in open court, take and subscribe the oath prescribed in section seventeen hundred and fifty-six, Title, "PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS," and also an oath that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

Restrictions upon registers. SEC. 4996. No register shall be counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of those courts as courts of bankruptcy, nor shall he be interested in the fees or emoluments arising from any such trusts.

Removal of registers. SEC. 4997. Registers are subject to removal from office by the judge of the district court.

Powers of registers. SEC. 4998. Every register in bankruptcy has power:

First. To make adjudication of bankruptcy in cases unopposed.

Second. To receive the surrender of any bankrupt.

Third. To administer oaths in all proceedings before him.

Fourth. To hold and preside at meetings of creditors.

Fifth. To take proof of debts.

Sixth. To make all computations of dividends, and all orders of distribution.

Seventh. To furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case.

Eighth. To audit and pass accounts of assignees.

Ninth. To grant protection.

Tenth. To pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose.

Eleventh. To sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct.

Limitations upon powers of registers. SEC. 4999. No register shall have power to commit for contempt, or to make adjudication of bankruptcy when opposed; or to decide upon the allowance or suspension of an order of discharge.

Registers to keep memoranda of proceedings. SEC. 5000. Every register shall make short memoranda of his proceedings in each case in which he acts, in a docket to be kept by him for that purpose, and shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of these memoranda, which shall be entered by the clerk in the proper minute-book to be kept in his office.

Registers to attend at place directed by judge. SEC. 5001. The judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this Title as may not be opposed, of attending any meeting of creditors, or receiving any proofs of debts, and, generally, for the prosecution of any proceedings under this Title.

Power to summon witnesses. SEC. 5002. Every register, so acting, shall have and exercise all powers, except the power of commitment, vested in the district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents.

Mode of taking evidence. SEC. 5003. Evidence or examination in any of the proceedings under this Title may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

Depositions and acts to be reduced to writing. SEC. 5004. All depositions of persons and witnesses taken before a register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. He shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of circuit courts.

Witnesses must attend. SEC. 5005. Parties and witnesses summoned before a register shall be bound to attend in pursuance of such summons at the time and place designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna.

Contempt before register. SEC. 5006. Whenever any person examined before a register refuses or declines to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, and to punish him for contempt, if such person be compellable by law to answer such question or to sign such examination.

Registers may act for each other. SEC. 5007. Any register may act in the place of any other register appointed by and for the same district court.

Payment of fees of registers. SEC. 5008. The fees of registers, as established by law or by rules and orders framed pursuant to law, shall be paid to them by the parties for whom the services may be rendered.

Contested issues to be decided by judge. SEC. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

Certificates of matters to be decided by judge. SEC. 5010. Any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

Appeal from judge's decision upon questions submitted. SEC. 5011. In any proceedings within the jurisdiction of the court, under this Title, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it is agreed and stated in the special case

that either party may appeal, if, in such case, an appeal is allowed by this Title. The parties may also, if they think fit, agree, that upon the questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

Penalties against officers. SEC. 5012. If any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy shall, for anything done or pretended to be done under this Title, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by law, such person shall forfeit and pay a sum not less than three hundred dollars and not more than five hundred dollars, and be imprisoned not exceeding three years.

Meaning of terms and computation of time. SEC. 5013. In this Title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger," shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal," shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this Title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this Title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, Christmas Day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

CHAPTER TWO.

VOLUNTARY BANKRUPTCY.

Petition and schedules. SEC. 5014. If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of res-

idence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

Schedule of debts. SEC. 5015. The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

Inventory of property. SEC. 5016. The said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, assignable under this Title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

Oath to petition and schedule. SEC. 5017. The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

Oath of allegiance. SEC. 5018. Every citizen of the United States petitioning to be declared bankrupt shall, on filing his petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath may be taken before either of the officers mentioned in the preceding section, and shall be filed and recorded with the proceedings in bankruptcy.

Warrant to marshal. SEC. 5019. Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies.

Amendment of schedule. SEC. 5020. Every bankrupt shall be at liberty, from [time] to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts.

Acts of bankruptcy. SEC. 5021. Any person residing within the

jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars:

First. Who departs from the State, district, or Territory of which he is an inhabitant with intent to defraud his creditors, or, being absent, remains absent with such intent; or,

Second. Who conceals himself to avoid the service of legal process in any action for the recovery of a debt or demand provable in bankruptcy; or,

Third. Who conceals or removes any of his property to avoid its being attached, taken, or sequestered on legal process; or,

Fourth. Who makes any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or,

Fifth. Who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate, and for a sum exceeding one hundred dollars, if such process is remaining in force and not discharged by payment, or in some other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or,

Sixth. Who has been actually imprisoned for more than seven days in a civil action founded on contract, for the sum of one hundred dollars or upward; or,

Seventh. Who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, makes any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or gives any warrant to confess judgment; or procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property, to defeat or delay the operation of this act; or,

Eighth. Who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. And if such person shall be adjudged a bankrupt, the assignee, may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Title, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Title was intended, and that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.

Prior acts of bankruptcy. SEC. 5022. Any act of bankruptcy com-

mitted since the second day of March, eighteen hundred and sixty-seven, may be the foundation of an adjudication of involuntary bankruptcy, upon a petition filed within the time prescribed by law, equally with one committed hereafter.

Who may file petition. SEC. 5023. An adjudication of bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.

Proceedings after filing the petition. SEC. 5024. Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The court may also, by injunction restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this Title from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court.

Service of order to show cause. SEC. 5025. A copy of the petition and order to show cause shall be served on the debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

Proceedings on return day. SEC. 5026. On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writ-

ing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

Costs at trial. SEC. 5027. If upon such hearing or trial the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.

Warrant. SEC. 5028. If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

Distribution of property of debtor. SEC. 5029. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those [*hereinbefore*] [hereinafter] provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

Schedule and inventory. SEC. 5030. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, postpaid, to the messenger, a schedule of the creditors and an inventory of his estate in the form and verified in the manner required of a petitioning debtor.

Proceedings when debtor is absent. SEC. 5031. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

CHAPTER FOUR.

PROCEEDINGS TO REALIZE THE ESTATE FOR CREDITORS.

Contents of notice to creditors. SEC. 5032. The notice to creditors under warrant shall state:

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

Marshal's return. SEC. 5033. At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

Choice of assignee. SEC. 5034. The creditors shall, at the first meeting held after due notice from the messenger in presence of the register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

Who are disqualified. SEC. 5035. No person who has received any preference contrary to the provisions of this Title shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

Bond of assignee. SEC. 5036. The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

Assignee liable for contempt. SEC. 5037. Any assignee who refuses or unreasonably neglects to execute an instrument when lawfully re-

quired by the court, or disobeys a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

Resignation of the trust. SEC. 5038. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom.

Removal of assignee. SEC. 5039. The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

Effect of resignation or removal. SEC. 5040. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

Filling vacancies. SEC. 5041. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person as the court shall direct.

Vesting estate in remaining assignee. SEC. 5042. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and in the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Former assignee to execute instruments. SEC. 5043. Any former assignee, his executors and administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

Assignment. SEC. 5044. As soon as an assignee is appointed and qualified, the judge, or where there is no opposing interest, the register, shall by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor,

and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

Exemptions. SEC. 5045. There shall be exempted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws in each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

What property vests in assignee. SEC. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal; and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

Right of action of assignee. SEC. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own

name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

No abatement by death or removal. SEC. 5048. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

Copy of assignment conclusive evidence of title. SEC. 5049. A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

Bankrupt's books of account. SEC. 5050. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon.

Debtor must execute instruments. SEC. 5051. The debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Chattel mortgages. SEC. 5052. No mortgage of any vessel or of any other goods or chattels, made as security for any debt, in good faith and for a present consideration and otherwise valid, and duly recorded pursuant to any statute of the United States or of any State, shall be invalidated or affected by an assignment in bankruptcy.

Trust property. SEC. 5053. No property held by the bankrupt in trust shall pass by the assignment.

Notice of appointment of assignee and record of assignment. SEC. 5054. The assignee shall immediately give notice of his appointment, by publication at least once a week for three consecutive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the

bankrupt ought by law to be recorded. [And the record of such assignment, or of a duly certified copy thereof, shall be evidence thereof in all courts.]

Assignee to demand and receive all assigned estate. SEC. 5055. The assignee shall demand and receive, from all persons holding the same, all the estate assigned or intended to be assigned.

Notice prior to suit against assignee. SEC. 5056. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

Time of commencing suits. SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed.

Assignee's accounts of money received. SEC. 5058. The assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

Assignee to keep money and goods separate. SEC. 5059. The assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be liable to be taken as his property or for the payment of his debts.

Temporary investment of money. SEC. 5060. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or register, or may authorize it to be deposited in any convenient bank, upon such interest, not to exceed the legal rate, as the bank may contract with the assignee to pay thereon.

Arbitration. SEC. 5061. The assignee, under the direction of the court, may submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators to be chosen by him and the other party to the controversy, and, under such direction, may compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

Assignee to sell property. SEC. 5062. The assignee shall sell all

such unincumbered estate, real and personal, which comes into his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors.

Sale of disputed property. SEC. 5063. Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

Sale of uncollectable assets. SEC. 5064. The assignee may sell and assign, under the direction of the court and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

Sale of perishable property. SEC. 5065. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

Discharge of liens. SEC. 5066. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

Provable debts. SEC. 5067. All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken,

converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

Contingent debts. SEC. 5068. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Liability of bankrupt as surety. SEC. 5069. When the bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

Sureties for bankrupt. SEC. 5079. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

Debts falling due at stated periods. SEC. 5071. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

No other debts provable. SEC. 5072. No debts other than those specified in the five preceding sections shall be proved or allowed against the estate.

Set-offs. SEC. 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition.

Distinct liabilities. SEC. 5074. When the bankrupt, at the time of adjudication, is liable upon any bill of exchange, promissory note, or

other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts.

Secured debts. SEC. 5075. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

Proof of debt. SEC. 5076. Creditors residing within the judicial district where the proceedings in bankruptcy are pending shall prove their debts before one of the registers of the court, or before a commissioner of the circuit court, within the said district. Creditors residing without the district, but within the United States, may prove their debts before a register in bankruptcy, or a commissioner of a circuit court, in the judicial district where such creditor, or either one of joint creditors, reside; but proof taken before a commissioner, shall be subject to revision by the register of the court.

Creditor's oath. SEC. 5077. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, under oath, and signed by the deponent, setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth; that the claim was not procured for the purpose of influencing the proceedings in bankruptcy; and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the claim, or any part thereof, or to take or

receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings, is or shall be in any way affected, influenced or controlled. No claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Oath, by whom made. SEC. 5078. Such oath shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which case the demand may be verified by the attorney or authorized agent of the claimant, testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge. Corporations may verify their claims by the oath of their president, cashier, or treasurer. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Oath, before whom taken; proof sent to register. SEC. 5079. Such oath may be taken in any district before any register or any commissioner of the circuit court authorized to administer oaths; or, if the creditor is in a foreign country, before any minister, consul, or vice-consul of the United States. When the proof is so made it shall be delivered or sent by mail to the register having charge of the same.

Proof to be sent to assignee. SEC. 5080. If the proof is satisfactory to the register it shall be delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time of receipt of such proof, and the amount and nature of the debts. Such books shall be open to the inspection of all the creditors. The court may require or receive further pertinent evidence either for or against the admission of any claim.

Examination by court into proof of claims. SEC. 5081. The court may, on application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake.

Withdrawal of papers. SEC. 5082. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall indorse upon it the name of the party against

whose estate it has been proved, and the date and amount of any dividend declared thereon.

Postponement of proof. SEC. 5083. When a claim is presented for proof before the election of the assignee, and the judge or register entertains doubts of its validity or of the right of the creditor to prove it, and is of the opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Surrender of preferences. SEC. 5084. Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of bankruptcy, or to any provisions of this Title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

Allowance and list of debts. SEC. 5085. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers.

Examination of bankrupt. SEC. 5086. The court may, on the application of the assignee, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings.

Examination of witness. SEC. 5087. The court may, in like manner, require the attendance of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

Examination of bankrupt's wife. SEC. 5088. For good cause shown, the wife of any bankrupt may be required to attend before the court to the end that she may be examined as a witness; and if she does not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he proves to the satisfaction of the court that he was unable to procure her attendance.

Examination of imprisoned or disabled bankrupt. SEC. 5089. If the bankrupt is imprisoned, absent, or disabled from attendance, the

court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court.

No abatement upon death of debtor. SEC. 5090. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

Distribution of bankrupt's estate. SEC. 5091. All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

Second meeting of creditors. SEC. 5092. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undetermined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

Third meeting of creditors. SEC. 5093. Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor after-

ward come to the hands of the assignee in the case of the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

Notice of meetings. SEC. 5094. The assignee shall give such notice to all known creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

Creditor may act by attorney. SEC. 5095. Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

Settlement of assignee's account. SEC. 5096. Preparatory to the final dividend, the assignee shall submit his account to the court and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

Dividend not to be disturbed. SEC. 5097. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Omission of assignee to call meetings. SEC. 5098. If by accident, mistake, or other cause, without fault of the assignee, either or both of the second or third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if meeting had been duly held.

Compensation of assignee. SEC. 5099. The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

Commissioners. SEC. 5100. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per

centum on the excess of over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

Debts entitled to priority. SEC. 5101. In the order for a dividend, the following claims shall be entitled to priority, and to be first paid in full in the following order:

First. The fees, costs, and expenses of suits, and of the several proceedings in bankruptcy under this Title, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws thereof.

Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of the proceedings in bankruptcy.

Fifth. All debts due to any person who, by the laws of the United States, are, or may be, entitled to a priority, in like manner as if the provisions of this Title had not been adopted. But nothing contained in this Title shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

Notice of dividend to each creditor. SEC. 5102. Whenever a dividend is ordered, the register shall, within ten days after the meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward, by mail, to every creditor a statement of the dividend to which he is entitled, and such creditors shall be paid by the assignee in such manner as the court may direct.

Settlement of bankrupt estates by trustees. Composition with creditors. SEC. 5103. If at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it appears, after hearing the bankrupt and

such creditors as desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, the court shall confirm it; and upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt shall be wound up and settled by trustees, according to the terms of such resolution, the bankrupt, or, if an assignee has been appointed, the assignee, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done, had such resolution not been passed. Such consent and the proceedings under it shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it. The court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors; and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy; and the trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have the power to summon and examine, on oath or otherwise, the bankrupt, or any creditor, or any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy; and the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Title. If the resolution is not duly reported, or the consent of the creditors is not duly filed, or if, upon its filing, the court does not think fit to approve thereof, the bankruptcy shall proceed as if no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Title.

CHAPTER FIVE.

PROTECTION AND DISCHARGE OF BANKRUPTS.

Bankrupt subject to orders of court. SEC. 5104. The bankrupt shall at all times, until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be required pursuant to this section, and it appears that such absence was not caused by willful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default.

Waiver of suit by proof of debt. SEC. 5105. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby.

Stay of suits. SEC. 5106. No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

Exemption from arrest. SEC. 5107. No bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.

Application for discharge. SEC. 5108. (*At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt*

may apply to the court for a discharge from his debts.) (At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.)

Notice to creditors. SEC. 5109. Upon application for a discharge being made the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

Grounds for opposing discharge. SEC. 5110. No discharge shall be granted, or, if granted, shall be valid, in any of the following cases:

First. If the bankrupt has willfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

Second. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

Third. If, within four months before the commencement of such proceedings, the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

Fourth. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

Fifth. If the bankrupt has given any fraudulent preferences contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this Title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or

has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

Sixth. If the bankrupt, having knowledge that any person has proved such false and fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

Seventh. If the bankrupt, being a merchant or tradesman, has not, at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

Eighth. If the bankrupt, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

Ninth. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

Tenth. If the bankrupt has been convicted of any misdemeanor under this Title.

Specification of grounds of opposition. SEC. 5111. Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

Assets equal to fifty per cent. required. SEC. 5112. In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

Final oath of bankrupt. SEC. 5113. Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

Discharge of bankrupt. SEC. 5114. If it shall appear to the court that the bankrupt has in all things conformed to his duty under this Title, and that he is entitled, under the provisions thereof, to receive

a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

Form of certificate of discharge. SEC. 5115. The certificate of a discharge in bankruptcy shall be in substance in the following form:

District court of the United States, district of

Whereas has been duly adjudged a bankrupt under the Revised Statutes of the United States, Title "BANKRUPTCY," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims which by said Title are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at , in the said district, this day of , .

(Seal.) , Judge.

Second bankruptcy. SEC. 5116. No person who has been discharged, and afterwards becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

Certain debts not released. SEC. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Liability of other persons not released. SEC. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

Effect of discharge. SEC. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The

certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

Application to annul discharge. SEC. 5120. Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section fifty-one hundred and ten it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditors before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

CHAPTER SIX.

PROCEEDINGS PECULIAR TO PARTNERSHIPS AND CORPORATIONS.

Bankruptcy of partnerships. SEC. 5121. Where two or more persons who are partners in trade are adjudged bankrupts, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this Title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any

balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

Of corporations and joint-stock companies. SEC. 5122. The provisions of this Title shall apply to all moneyed business or commercial corporations and joint-stock companies, and upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporations or company in relation to the same matters concerning the corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this Title when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation by proceedings under this Title is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this Title in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof.

Authority of State courts in proceedings against corporations, &c. SEC. 5123. Whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the

courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

CHAPTER SEVEN.

FEES AND COSTS.

Fees. SEC. 5124. In each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order for fees in bankruptcy, the following fees, which shall be applied to paying for the services of the registers:

First. For issuing every warrant, two dollars.

Second. For each day in which a meeting is held, three dollars.

Third. For each order for a dividend, three dollars.

Fourth. For every order substituting an arrangement by trust-deed for bankruptcy, two dollars.

Fifth. For every bond with sureties, two dollars.

Sixth. For every application for any meeting in any matter under this [*act*,] [Title,] one dollar.

Seventh. For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

Eighth. For taking depositions, the fees now allowed by law.

Ninth. For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the clerk of the court fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Traveling and incidental expenses. SEC. 5125. The traveling and incidental expenses of the register, and of any clerk or other officer attending him, shall be settled by the court in accordance with the rules prescribed by the justices of the Supreme Court, and paid out of

the assets of the estate in respect of which such register has acted; or if there are no such assets, or if the assets are insufficient, such expenses shall form a part of the costs in the case in which the register acts, to be apportioned by the judge.

Marshal's fees. SEC. 5126. Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

Justices of Supreme Court may change tariff of fees. SEC. 5127. The enumeration of the foregoing fees shall not prevent the justices of the Supreme Court from prescribing a tariff of fees for all other services or the officers of courts of bankruptcy, or from reducing the fees prescribed in the three preceding sections, in classes of cases to be named in their general orders.

CHAPTER EIGHT.

PROHIBITED AND FRAUDULENT TRANSFERS.

Preferences by insolvent. SEC. 5128. If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

Fraudulent transfers of property. SEC. 5129. If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this [*act*] [Title,] or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

Presumptive evidence of fraud. SEC. 5130. The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is prescribed in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud.

Fraudulent agreements. SEC. 5131. Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for a discharge of the bankrupt, shall be void; and any creditor who obtains any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

Penalties against fraudulent bankrupt. SEC. 5132. Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor:

First. Who secretes or conceals any property belonging to his estate; or,

Second. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or,

Third. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or,

Fourth. Who makes any payment, gift, sale, assignment, trans-

fer, or conveyance of any property belonging to his estate with the like intent; or,

Fifth. Who spends any property belonging to his estate in gaming; or,

Sixth. Who, with intent to defraud, wilfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this Title to be described therein; or,

Seventh. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or,

Eighth. Who attempts to account for any of his property by fictitious losses or expenses; or,

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or,

Tenth. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for,

Shall be punishable by imprisonment, with or without hard labor, for not more than three years.

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